Supreme Court, U.S.
FILED

(1) 98 907 NOV 25 1998

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of The United States
October Term 1998

AJAY PATEL, et al.
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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105 pp

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QUESTIONS PRESENTED

1. May the Second Circuit ignore this Court and establish jurisdiction where no jurisdiction can exist by re-examining and then ignoring the clear and exhaustive analysis of this Court in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, _ U.S. _, 118 S.Ct.956, 140 L.Ed.2d 62 (1998), and in so doing allow a transferee court to decide a case where it has no jurisdiction to do so under 28 *U.S.C.* § 1407?

2. If, at the end of the pre-trial phase in a multi-district litigation case, a transferee court lacks jurisdiction to hear an action because it cannot assign a transferred case to itself, may the Second Circuit nonetheless circumvent the plain command of 28 *U.S.C.* § 1407 and *sua sponte* endow a transferee court with "jurisdiction" by capriciously proclaiming that this Court's interpretation of the important interests embodied in § 1407 should only be given prospective application?

3. Did this Court intend that its holding in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, _ U.S. _, 118 S.Ct.956, 140 L.Ed.2d 62 (1998), delineating the jurisdiction of transferee courts embodied in 28 *U.S.C.* § 1407, be given only prospective application?

4. In a claim for damages brought under the provisions of the Warsaw Convention premised upon an airline's willful failure to provide adequate security that allowed an armed highjacking of an aircraft that killed twenty passengers and injured scores of others, did the District Court err in instructing the jury that Plaintiffs were obligated to establish the airline's willful cooperation in the commission of the terrorist act in order for Plaintiffs to obtain full recovery?

PARTIES TO THE PROCEEDINGS

Petitioners herein are AJAY PATEL, a minor, by and through his Guardian ad Litem, PARVATI PATEL; PARVATI PATEL; AVANI B. SHAH and RUPAL B. SHAH, minors, by their Guardian ad Litem, BIPIN M. SHAH; AISHA BEGUM; MEHBOOB KAHN; GAYATRI DAVE and GARGI DAVE, minors, by their Guardian ad Litem, VINOD DAVE; SANJAY PATEL, a minor, by and through his Guardian ad Litem, C.N. PATEL; RANJANBEN PATEL and JAYSHREEBEN PATEL, minors, by and through their Guardian ad Litem, PRAVIN PATEL; KHANJAN DALAL; KALPESH DALAL; DEEPALI DESAI; NAGIN PATEL; TARA PATEL; SATISH PATEL; GOVIND PATEL; CHOTUBHAI PATEL; JAMNA PATEL; GANGA PATEL; DILIP PAREKH; FARAIDOON OSHTORY; MANJULA S. PATEL, SANGITA PATEL, NIKITA PATEL, Individually and as Heirs at Law to Surendra Patel, Deceased; BAKUL SHAH; and FATHER ANTHONY THEODORE, individually, (collectively, "the *Patel* Petitioners and/or *Patel* Plaintiffs"). The *Patel* Petitioners were Plaintiffs in the United States District Court for the Southern District of New York and Appellants in the proceedings in the United States Court of Appeals for the Second Circuit.

Respondents, Pan American World Airways, Inc. ("Pan Am"), a New York corporation, and Alert Management ("Alert"), a Florida corporation, were Defendants in the District Court and Appellees in the Court of Appeals.

A connected and related Petition in this matter has also been concurrently filed with this Court by Petitioners Sadanand Singh, Individually and as Executor of the Estate of Kala Singh, Deceased, Samir Singh, by and through Sadanand Singh, Guardian ad Litem, and Kalpana Singh, by and through Sadanand Sing, Guardian ad Litem (collectively, the "*Singh* Plaintiffs"), who were also Plaintiffs in the District Court and Appellants in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This Petition seeks review of the opinion rendered herein by the United States Court of Appeals for the Second Circuit as reported at *Shah v. Pan American World Services, Inc.*, 148 F.3D 84 (2nd Cir. 1998). A copy of the opinion is reproduced in Appendix A (Apdx. A-2 thru A-43). The orders of the United States District Court for the Southern District of New York are unreported. Copies of these documents are reproduced in Appendix B (Apdx. B-44 thru B-62).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was filed June 15, 1998. A timely Petition for Rehearing and Suggestion for Rehearing *in banc* was filed June 29, 1998. On August 28, 1998, the Court of Appeals entered its order denying the Petition for Rehearing and Rejecting the Suggestion for Rehearing *in banc*. (Apdx. A-1 thru A-43.) The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* § 1254(1).

TREATIES AND STATUTES INVOLVED

The Convention for the Unification of Certain Rules Relating to International Transport by Air, Oct. 12, 1929, 49 Stat., part II, p. 3000, TS No. 876 (1934), reprinted in, 49 *U.S.C.* § 40105 (1997) ("The Warsaw Convention").

Article 17 of the Warsaw Convention states:

> The carrier shall be liable for damage sustained in the event of the death or

wounding of a passenger or any bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 24(1) of the Warsaw Convention states:

> In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

Article 24(2) of the Warsaw Convention states:

> In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25 of the Warsaw Convention states:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful [sic] misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful [sic] misconduct.

28 *U.S.C.A.* § 1404(a) states:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it

might have been brought.

28 *U.S.C.A.* § 1407(a) states:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

STATEMENT OF THE CASE

A. Factual Background

This Petition concerns claims arising from the tragic terrorist hijacking of Pan Am Flight 73 in Karachi, Pakistan, that led to twenty deaths and numerous other injuries. The *Patel* Plaintiffs are passengers who were injured, or heir representatives of passengers who were killed, as a result of the hijacking. The claims brought by the *Patel* Plaintiffs emanate from and are related to the willful misconduct of Pan Am.

In 1986, Pan Am publicly announced the creation of the Alert program which was designed to establish and implement extraordinary security measures to deal with terrorism at airports worldwide used by Pan Am. Additionally, prior to the hijacking, Pan Am began charging a security surcharge of $5.00 on each one-way ticket, or $10.00 on each round-trip ticket on transatlantic routes to pay for the added security measures.

The Pan Am Flight 73 passengers suffered loss of life and serious personal injuries on September 5, 1986 at Karachi International Airport, Karachi, Pakistan. Despite its improved security advertisements and fare surcharges, Pan Am never provided additional security in Karachi after the security surcharge began being collected in April 1986, and terrorists were permitted to drive through an open cargo gate, take control Pan Am's Flight 73 aircraft, imprison its passengers for some seventeen hours, and then attack them with machine guns and hand grenades.

B. Proceedings in the District Court

In 1987 and 1988, several individual constituent actions were filed against Pan Am for damages for personal injuries and for property damage alleging negligence, willful misconduct, and breach of contract, in the Superior Court of the State of California, United States District Court, Central District of California, United States District Court, Southern District of California, and the United States District Court, Southern District of New York.

On May 6, 1987, these actions were transferred by the Judicial Panel on Multidistrict Litigation ("JPML") to the Southern District of New York ("SDNY") for consolidated pre-trial discovery and motion proceedings, only, under 28 *U.S.C.* § 1407. Upon completion of pre-trial proceedings, the SDNY was statutorily required to transfer the actions back to the JPML. Instead of complying with the plain command of the § 1407 transfer mandate, the SDNY transferred all of the actions to itself and consolidated said actions for trial in that court pursuant to its Order entered December 13, 1993, over the objection of the *Patel* Plaintiffs. (Apdx. C-63 thru C-68.)

The *Patel* Plaintiffs' claims against Pan Am were tried before a jury, the Honorable John E. Sprizzo, District Judge presiding, during March and April of 1994. Since the horrific incident occurred during international air travel, the provisions of the Warsaw Convention governing liability were applicable. While the Warsaw Convention provisions establish a limitation on strict liability damages assessable against an airline carrier for international aviation incidents,

if Plaintiffs' injuries and damages were caused by the willful misconduct of Pan Am, the Convention damages limitation cap would be deemed inapplicable.

The jury rendered its liability special verdict against Pan Am on April 14, 1994, finding that while Pan Am had engaged in willful misconduct in connection with the Alert program, Pan Am's willful misconduct had not proximately caused the hijacking. Integrally, the jury did not address whether the willful misconduct of Pan Am had caused the *Patel* Petitioners' injuries and damages.

On March 27, 1997, nearly three years after the jury verdict had been rendered, Judgment was entered in favor of the *Patel* Plaintiffs limiting the amount of their damages pursuant to the Convention provisions. (Apdx. B-44 thru B-62.)

C. Proceedings in the Court of Appeals

Timely Notices of Appeal were filed on April 24 and April 28, 1997 by the *Patel* Plaintiffs.[1] The issues presented for review fundamentally pertained to whether an incorrect standard of "causation" was used at trial in that the District Court had instructed the jury to determine whether the willful misconduct caused the hijacking rather than allowing the hijacking to occur, from which Plaintiffs' injuries and

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1 Timely Notices of Appeal were also filed by the *Singh* Plaintiffs, and the *Patel* Plaintiffs timely joined in the critical "causation" issues presented for review by the *Singh* Plaintiffs.

damages arose. Additionally, review was sought as to whether the trial judge's misconduct in questioning Plaintiffs' security expert went to the issue of causation supporting a finding of prejudicial judicial misconduct.

a. Retroactive Applicability of *Lexecon*

Pivotally, while the Appeal was still pending in the Second Circuit, this Court decided *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, _ U.S. _, 118 S.Ct.956, 140 L.Ed.2d 62 (1998), and accordingly, *retroactive applicability of Lexecon* became a *threshold issue* in the Court of Appeals. The *Patel* Plaintiffs and *Singh* Plaintiffs both explicitly argued on Appeal that when the SDNY invoked § 1404(a) (change of venue) to assign this JPML transferred action to itself, the SDNY's self-assignment was in direct conflict with this Court's *Lexecon* mandate directing that a district court conducting pretrial proceedings in multidistrict litigation pursuant to 28 *U.S.C.A.* § 1407(a) has *no authority* to invoke § 1404(a) (change of venue) to assign a transferred case to itself for trial. Plaintiffs further argued on Appeal that *Lexecon* was indeed "*retroactively*" applicable to this action which was still on direct review.

While the Second Circuit unequivocally recognized this Court's *Lexecon* directive, it nonetheless affirmed the SDNY self-assignment transfer in this action by opining that the rule in *Lexecon* did *not apply retroactively since this Court purportedly "reserved the question of whether its holding would be applied to the parties before it."* (Apdx. A-13 thru A-17 [Opinion at 13-16].) In effect, the Second

Circuit determined that this Court's *Lexecon* ruling reversed longstanding practice and that retrospective application would frustrate the essential purpose of the statute providing for transfer of cases for consolidated pretrial proceedings, *i.e.*, to promote the just and efficient conduct of complex multidistrict litigation. Instead, the Second Circuit erroneously engaged in a *Chevron Oil v. Huson*, 404 U.S. 97 [92 S.Ct. 349, 30 L.Ed.2d 296] (1971) analysis in an effort to justify the SDNY's erroneous self-transfer.

b. Causal Nexus Interpretation for Establishment of Liability for Willful Misconduct Under Article 25 of the Warsaw Convention

In addressing Plaintiffs' arguments that the SDNY had used an incorrect standard of causation at trial, Circuit Judge John Walker Jr., affirming the SDNY's standard of causation for fraud-based claims under the Warsaw Convention, stated that the issue was one of first impression and proceeded to establish an unprecedented and insurmountable causation test for claims asserting willful misconduct. (Apdx. A-24 thru A-25 [Opinion at 23-24].) Essentially, the causation test fostered by Judge Walker would require that the injured claimant seeking compensation under the Warsaw Convention where there has been willful misconduct on the part of an international air carrier, must establish a direct, actual participation by the air carrier in the injury producing act. (Apdx. A-21 thru A-32 [Opinion at 20-31].)

In imposing such a restrictive causal nexus test, Judge Walker virtually forecloses the ability of any claimant to

establish a criminal act could have been precluded by the air carrier under the Convention, and contorts the operative language of the official French text of Article 25 of the Convention, *to wit*: the difference between damage "*arising out of the willful misconduct*" versus damage "*caused by willful misconduct.*" Rather, if a claimant is able to establish a *reasonable relationship* between the willful act, error, omission, and/or misrepresentation on the part of the air carrier that then allowed the commission of an intentional or criminal act by another, resulting in injury to passengers, then the burden should be shifted to the air carrier to show that its willful misrepresentation did not participate in setting the stage for the injury producing event.

c. Finality of Second Circuit Decision

Petitions for Rehearing and Suggestion for Rehearing *in banc* were timely filed by the *Patel* and *Singh* Plaintiffs, respectively and concurrently. The *Patel and Singh* Plaintiffs respectfully petitioned the Second Circuit panel for a rehearing and reconsideration of its Opinion given the direct conflict with this Court's *Lexecon* holding and controlling case law on the analysis to be employed in determining "*express reservation*" of retroactivity by this Court, as well as incorrect application of controlling case law regarding the underlying analysis and conclusions reached on critical causation issues. In furtherance of Plaintiffs' *Lexecon* "*retroactive application*" contentions, the Petition for Rehearing also respectfully requested that the Court of Appeals' panel take judicial notice of two (2) Orders filed in

Lexecon after remand for further proceedings consistent with the opinion rendered by this Court. These Orders demonstrably establish that this Court did not reserve the question whether its holding should be applied to the parties before it in *Lexecon* given that no subsequent proceedings on remand were held as to retroactivity in that matter, *and* there was direct referral of the case to the JPML consistent with this Court's ruling therein.

By way of its Order filed August 28, 1998, the Second Circuit denied said Petition for Rehearing, and it was further noted that the Suggestion for Rehearing *in banc* had not been requested by any judge for the Court in regular service or any judge that heard the appeal, and that no such judge had requested that a vote be taken thereon. (Apdx. A-1.)

REASONS FOR GRANTING THE WRIT

I

THE SECOND CIRCUIT OPINION DIRECTLY CONFLICTS WITH THIS COURT'S *LEXECON* HOLDING CONFIRMING THE MANDATORY DIRECTIVE OF 28 *U.S.C.* § 1407.

The Second Circuit's attempt to devise a basis upon which to accord deference to what was unquestionably a longstanding practice of self-assignment in JPML cases, is nevertheless in direct conflict with this Court's *Lexecon* observation that the straightforward imperative or command established by the statutory language employed in 28 *U.S.C.* § 1407 "creates an obligation impervious to judicial

discretion," and consequently entails the invalidity of self-assignment power in a transferee court. *Lexecon*, *supra*, 118 S.Ct. at 962, 964. Hence, the genesis of *Lexecon's* authoritative fiat:

> "[T]he plain command of a statute should be given effect 'even if doing that will reverse the longstanding practice under the statute and the rule.'[*Id.* at 962 (citation omitted).]"

The Second Circuit is not free to reexamine this Court's *Lexecon* ruling and reach a different conclusion. *C.f.*, *Garner v. Memphis Police Dept.*, 8 F.3d 358, 362 (6th Cir. 1993). Indeed, while this Court acknowledged in *Lexecon* that broader district court authority to transfer cases might be desirable, "*the proper venue for resolving that issue remains the floor of Congress," not* an Opinion such as that rendered by the Second Circuit in this action. [Emphasis added; *Lexecon*, *supra*, 118 S.Ct. at 964.]

Accordingly, the SDNY, as a transferee court conducting pretrial proceedings, had no authority to self-assign this multidistrict proceeding for trial. It is axiomatic that "the §1407(a) mandate would lose all meaning if a party who continuously objected to an uncorrected categorical violation of the mandate," *such as all Plaintiffs did in this action*, "could obtain no relief at the end of the day." *Id.* at 965-66.

In determining whether *Lexecon* was to be applied retroactively to this case, the Second Circuit indeed acknowledged the controlling general principle of law

pertaining to retroactive effect, as enunciated by this Court in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), reflecting the majority position in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 539-43, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991):

> "When [this Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."

However, the Second Circuit then improperly *surmised* that: a.) *Lexecon* was a case where this Court purportedly explicitly reserved the question of whether its holding should be applied to the parties before it; b.) retroactive application of *Lexecon* was *not* therefore required in this case; and *c.) instead,* application of the three-pronged *Chevron Oil* test was permissible. (Apdx. A-13 thru A-17[Opinion at 13-16].)

In so doing, the Second Circuit falls victim to the same flawed effort to distinguish controlling decisional law emanating from this Court as that attempted in *Beam* and by the Virginia state high court in *Harper*, which this Court has historically rebuffed. *Harper*, *supra*, 509 U.S. at 98-99; *Beam*, *supra*, 501 U.S. at 539-40.

The conclusion that this Court intended its *Lexecon* holding to be applied to the parties before it is *compelled* by

the reasoning of *Harper*, *supra*, 509 U.S. at 91-99, which gave controlling effect to the revised rules concerning *implied* retroactivity jurisprudence announced in *Beam*, *supra*, 501 U.S. at 539-40, as discussed further herein.

Moreover, the Second Circuit critically misstates the tenor of *Lexecon* footnote 5 in mounting its challenge to retroactive application of *Lexecon* to this action. The subject footnote clearly pertains to an *untimely* argument raised by the *Lexecon* respondents as to prospective application of any decision rejecting a transferee court's practice of ruling on §1404 transfer motions. The subject footnote does *not* meet the threshold requisites mandated for a determination that this Court expressly and explicitly reserved the issue of retroactivity as to the parties before it. Rather, the subject footnote unequivocally establishes that this Court found it "unnecessary...to consider" the *untimely suggestion*. It is, therefore, incongruous for the Second Circuit to *surmise* that this footnote established that this Court explicitly reserved the issue of retroactivity as to the *Lexecon* litigants.

Hence, the Second Circuit's Opinion is contrary to, as well as in direct conflict with, controlling case law and disregards the requisite standard of analysis to be employed in determining reservation by this Court of the retroactivity question under the "express reservation test."

II

THE SECOND CIRCUIT DISREGARDED THE STANDARD OF ANALYSIS FOR DETERMINING RESERVATION OF RETROACTIVITY.

This Court in *Harper*, *supra*, 509 U.S. at 97-99, followed the *Beam* retroactivity analysis (as quoted hereinabove – the so-called "pipeline doctrine"), which extended in a "*civil context*" the *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) ban against "selective application of new rules." Thus, *selective temporal barriers to the application of federal law in both civil and criminal cases is prohibited. Id.* at 97.

Beam instructs that retroactivity is the general rule of constitutional jurisprudence. *Beam*, *supra*, 501 U.S. at 543. Indeed, *Beam* exemplifies the ultimate refinement of the "pipeline doctrine" aimed at securing equality for all claims pending or capable of being litigated when the new rule is announced.

Harper, under the aegis of *Beam*, concludes that when the "Court does not 'reserve the question whether its holding should be applied to the parties before it,'...an opinion announcing a rule of federal law 'is properly understood to have followed the normal rule of retroactive application' and must be 'read to hold...that its rule should apply retroactively to the litigants then before the Court'." *Harper*, *supra*, 509 U.S. at 97-98.

Thus, the *rule* derived from *Beam* and *Harper*, the

"express reservation test," is clear. When this Court remands a case, unless it *explicitly* reserves the issue of retroactive application of that case, the *normal rule of retroactivity is assumed*. Tellingly in this regard, this Court in *Beam*, *supra*, 501 U.S. at 539-40, cited in pertinent part the following *precise*, *explicit* language utilized by the Court in *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 297-98, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987), as an *exemplar of the requisite type of statement upon which a court may properly opine that the Supreme Court has expressly reserved the question whether its holding should be applied to the parties before it*:

> "Appellees request that in the event of an adverse decision, *the Court remand the case...to consider whether the ruling should be applied retroactively* and to decide other remedial issues. We agree...." [Emphasis added to reflect the *Beam* excerption.]

Consequently, unless such an *explicit*, *precise statement of reservation is expressed in an opinion rendered by this Court*, it is *error* to assert that there has been a reservation of the question of retroactivity and refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. *Beam*, *supra*, 501 U.S. at 540.

In *Harper*, the Virginia state high court also attempted to apply the three-pronged *Chevron Oil* test in deciding the retroactivity issue presented by that litigation. *Harper*, *supra*, 509 U.S. at 97. In an effort to distinguish this Court's opinion rendered in *Davis v. Michigan Dept. of Treasury*, 489 U.S.

803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), the Virginia state high court, *surmised*, that this Court had "made no...ruling" about the application of the rule announced in *Davis* "retroactively applying to the litigants in that case." *Harper*, *supra*, 509 U.S. at 98.

To the contrary, this Court resoundingly disagreed holding that there was no requisite express and explicit language or statement reserving the retroactivity question in *Davis*, and cogently explained that any "consideration of remedial issues" means "necessarily" that this Court "retroactively applied" the rule announced in an opinion to the litigants before it. [*Id.* at 98-99, citing in pertinent part the opinion delivered by Justice Souter in *Beam*, *supra*, 501 U.S. at 539-40, which reflected the majority view of the Court therein.[2]]

In the instant action, the Second Circuit's *surmise* at p. 13 of the Opinion, is essentially identical to the *flawed surmises* in *Harper* and *Beam*. To mount its challenge to retroactive application of this Court's *Lexecon* holding, which unequivocally would have compelled remand of this matter to the district from which it was transferred pursuant to 28 *U.S.C.* § 1407, thereby rendering nugatory the trial court judgment, the Second Circuit improperly focused on an incidental footnote reference in *Lexecon* which has no bearing on the retroactive application of the holding premised on 28

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2 Notably, Justice Souter also delivered the opinion of the Court in *Lexecon*.

U.S.C. §1407 as to the parties therein. This footnote states as follows:

> "In their brief to this Court, Milberg *suggests that any decision rejecting multidistrict litigation courts' practice of ruling on §1404 transfer motions should be applied prospectively under Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971). Because this argument was not presented below, see Brief for Milberg Defendants in No. 95-16403, et al. (CA 9), or to this Court when Milberg opposed petitioners' petition for certiorari, see Brief in Opposition for Respondents Milberg et al., it is *unnecessary for us to consider it here.* [Emphasis added; *Lexecon*, *supra*, 118 S.Ct. at 965 n. 5.]"

Firstly, the Second Circuit critically *misstated* the tenor of *Lexecon* footnote 5. The subject footnote language is *not* tantamount to an express reservation as suggested in the Opinion at p. 13, and clearly, given a plain reading of its meaning, does *not* meet the threshold requisites of explicitness and preciseness mandated under the "express reservation test" as discussed hereinabove. *Beam*, *supra*, 501 U.S. at 540. The footnote is merely a rejection by this Court of an *untimely* suggestion. Indeed, the "remand" language utilized by this Court in "concluding" the *Lexecon* opinion does *not* manifest any reservation of the question whether its holding should be applied to the parties before it.

It is therefore, incongruous for the Second Circuit to utilize the subject footnote in its attempt to justify the surmise

that this Court reserved the question of whether its *Lexecon* holding premised on 28 *U.S.C.* § 140 7 applied to the *Lexecon* litigants before it.

Secondly, the remedial question was unquestionably considered in the unanimous Part III section of this Court's *Lexecon* opinion, which specifically begins with the statement: "The remaining question goes to the remedy." Meaning, therefore, that this Court "necessarily retroactively applied" the rule announced in an opinion to the litigants before it. *Harper*, *supra*, at 509 U.S. at 98-99.

Accordingly, based on a proper reading of *Lexecon* footnote 5, as well as an appropriate analysis under the "express reservation test" and affording due deference to the remedy consideration paradigm espoused by Justice Souter in *Beam*, engaging in a *Chevron Oil* analysis was foreclosed in this case, for as *Harper*, *supra*, 509 U.S. at 98 instructs:

> "[T]he legal imperative 'to apply a rule of federal law retroactively after the case announcing the rule has already done so' must 'prevai[l] over any claim based on a *Chevron Oil* analysis.' [Emphasis added; citing *Beam*, *supra*, 501 U.S. at 540, opinion of Souter, J.]"

Finally, it is respectfully submitted that this Court expressly reaffirmed its *Lexecon* holding was to be afforded retrospective application in granting petition for a writ of certiorari, vacating judgment, and remanding the matter of *B.C. Rogers Processors, Inc., et al. v. BOC Group, Inc., et al.*, _ U.S. _, 118 S.Ct. 2365, 141 L.Ed.2d 732 (1998):

> "[T]o the United States Court of Appeals for the

Eleventh Circuit for further consideration in light of *Lexecon* . . . ."

Like, the action herein, *B.C. Rogers* was on appeal in the Eleventh Circuit at the time that this Court rendered its holding in *Lexecon*, as *State of Florida v. Liquid Air*, 136 F.3d 139 (11th Cir. 1998), *vacated, remanded sub nom., B.C. Rogers Processors v. BOC Group, supra*, 118 S.Ct. 2365. Accordingly, it is respectfully submitted that this matter also be remanded by this Court for appropriate application of the *Lexecon* mandate.

III

INTERVENTION OF THIS COURT IS REQUIRED TO CORRECT THE SECOND CIRCUIT'S ERRONEOUS INTERPRETATION OF THE REQUISITE CAUSAL NEXUS TO ESTABLISH LIABILITY FOR WILLFUL MISCONDUCT UNDER ARTICLE 25 OF THE WARSAW CONVENTION.

The opinion of the Second Circuit Court of Appeal has imposed an unprecedented and insurmountable burden on claimants seeking compensation under Article 25 of the Warsaw Convention where there has been willful misconduct on the part of an international air carrier. In essence, where there has been a clear misrepresentation by an air carrier regarding security that has been relied upon by a claimant to his or her detriment, Judge Walker, and the Second Circuit, stand alone in requiring that the injured claimant establish an

actual, direct participation by the air carrier in the injury producing act before the claimant would receive the benefit of Article 25. Such a "causation test" standard is without support both in the language of the Convention itself, as well as the precedential body of case law interpreting the Convention.

Indeed, the Second Circuit's interpretation of the requisite causal nexus, particularly, where inadequate security has resulted in a criminal act producing injury to passengers, is simply unworkable and fundamentally unfair. It cannot reasonably be urged that the drafters of the Convention intended the imposition of such a restrictive nexus, and most certainly not in the context of claims where liability arises from willful misconduct which has allowed others to commit a negligent or criminal act, causing injury.

It is respectfully submitted that the appropriate gauge by which to measure causation within the context of liability under Article 25 for a criminal act arising out of willfully inadequate security, as well as misrepresentations pertaining thereto, is whether it was reasonably foreseeable to the air carrier that passengers would rely upon the misrepresentations of security in choosing that particular carrier and that injuries would result from security procedures that were not as represented. Where a claim is premised upon criminal or intentional conduct on the part of a third person, the appropriate standard to determine the air carriers' "responsibility" for that criminal act is whether its act, error, omission, or misrepresentation is reasonably related to

facilitating the attack that caused the injuries sustained.

This interpretation of causation is not without precedent:

> "If the likelihood that a third person may act in a particular manner is . . .one of the hazards which makes the actor [culpable] . . ., such an act whether innocent, negligent, intentionally tortious *or criminal* does not prevent the actor from being liable for the damage caused thereby."

(*Rosh v. Cave Imaging Systems, Inc.*, 26 Cal.App.4th 1225, 1236 [32 Cal.Rptr.2d 136, 141] (1994), quoting from *Restatement (Second) of Torts* §449; *accord*: *Landeros v. Flood*, 17 Cal.3d 399, 411 [131 Cal.Rptr. 69, 551 P.2d 389, 395] (1976); *Tucker v. Sandlin*, 126 Mich.App. 701, 704-705 [337 N.W.2d 637, 639-640] (1983) ; *Wooldridge v. Echelon Service Co.*, 243 Va. 458, 461-462 [416 S.E.2d 441, 443-444] (1992) .)

That "reasonable relationship" would not require participation on the part of the air carrier in the third party criminal act. Neither would it require that the claimant establish the event could not have occurred "but for" the willful misconduct of the air carrier. Rather, the injured passengers and claimants, in this case, should have been called upon to show that the willful misrepresentation concerning, and the ultimate inadequateness in, the security provided by the air carrier was "*a substantial factor*" in creating an environment whereby the criminal act and injury therefrom was reasonably foreseeable. *Rosh v. Cave Imaging*

Systems, Inc., *supra*, 26 Cal.App.4th at 1235 [32 Cal.Rptr.2d at 141].

It is respectfully submitted that, contrary to the opinion of the Second Circuit, such a standard *is* contemplated by the Convention. The official French text of Article 25 reads: "*si le dommage provient de son . . . .*" That does not translate to "if the damage is caused by." Correctly translated, the official French text of Article 25 would read: "if the damage arises out of the willful misconduct."[3] The drafters of the Convention knew how to say "*cause*" when that is what was intended. For example, the operative language of the official French text of Article 17 is "*cause le dommage*," and the corresponding language of the American translation is "caused the damage." This suggests that contrary to the conclusion of the Second Circuit, the drafters of the Convention understood "*arises out of*" to mean something different than "*caused by*."[4]

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3 *See, e.g.* , Robert C. Horner & Didier Legrez, *Second International Conference on Private Aeronautical Law Minutes*, (Warsaw 1929) 211, 213, 229 (1975) ("The carrier shall not have the right to avail himself of the provisions of the present Convention which exclude or limit his liability, if the damage *arises out of* the willful misconduct. . .") (Emphasis added.)

4 In *Air France v. Saks*, 470 U.S. 392, 398 (1985) this Court recognized the interpretive significance of the drafters' use of different words in different articles of the Convention: "This difference in the parallel language of Articles 17 and 18 implies that the drafters of the Convention understood the word `accident' to mean something different than the word `occurrence' for they

It would be nearly impossible for a claimant to establish a third party criminal act would have been precluded by the air carrier. However, if the claimant is able to establish a reasonable relationship between the willful act, error, omission, and/or misrepresentation on the part of the air carrier that then allowed the commission of an intentional or criminal act resulting in injury to passengers, then the burden should be shifted to the air carrier to show that its willful misrepresentation did not participate in setting the stage for the injury producing event.

Although each member of the Warsaw Convention may have its own translation, there is only one *official* version which controls all questions of interpretation. *In re Korean Airlines Disaster of September 1, 1983*, 932 F.2d 1475, 1486 (D.C. Cir. 1991):

> "French is the controlling language of the Convention. . .[W]e must interpret and apply the terms of Article 17 in accordance with their French legal meaning because the Convention was drafted in French by civil law jurists."

Accord: *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991); *Air France v. Saks*, *supra*, 470 U.S. at 397.

Contrary to the conclusion of Judge Walker, according to the plain meaning of the "*official*" Convention text, damage can be deemed to arise out of Pan Am's willful misconduct without necessarily having been caused by it.

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otherwise logically would have used the same word in each article."

The words "arising out of" are of much broader significance than "caused by," and are ordinarily understood to mean "originating from," "having its origin in," "growing out of" or "Flowing from." *Transport Indemnity Co., v. W.D. Schnack, M.D.*, 131 Cal.App.3d 149, 152 [182 Cal.Rptr. 256, 258] (1982); *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co. Of Wis.*, 189 F.2d 374, 378 (5th Cir. 1951); *Insurance Co. Of N. Am. v. Liberty Mut. Ins. Co.*, 1944 WL 150818 (S.D.N.Y. 1994); *Aetna Cas. & Sur. Co. v. Liberty Mut. Ins. Co.*, 459 N.Y.S. 2d 317, 320-21 (1983).

In its opinion, the Second Circuit Court of Appeals believed its interpretation of the causal nexus in the context of a claim premised upon willful misconduct would be complementary with the purported overriding purpose of the Convention in enacting Articles 17 and 25 which, in its mind, was "to limit air carriers liability in the event of accident." (Apdx. A-26 [Opinion at p. 25].) What the Second Circuit fails to recognize is that the Convention distinguishes between liability for an innocent or negligent carrier under Article 17, as opposed to the liability for a carrier under circumstances of willful misconduct as contemplated by Article 25. The Convention by its very language in structuring a system of air carrier liability incorporates a relaxed standard of causation where willful misconduct is involved. To establish liability, damage need merely "*arise out of*" a willful act. In so doing the drafters of the Convention were following an established principle of tort liability:

> "[R]esponsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one who is merely negligent or is not at fault."
> *Restatement (Second) Torts* § 435B.

Further support for a relaxed standard of causation where willful misconduct is involved is also apparent in the differences between Article 17 and Article 25. The standard of liability under Article 17 is strict liability because the carrier's conduct is deemed irrelevant. Indeed, Article 17 addresses damage "*caused by*" the accident, whereas Article 25 addresses damage *"arising out of"* the carrier's willful misconduct. Article 17 imposes liability without regard to the carrier's conduct so long as the *"accident causes"* the damage. Accordingly, not only is the causation standard adopted by the Second Circuit under circumstances of willful misconduct on the part of an air carrier contrary to the language of the Convention itself, but it is also inconsistent with the *"system of air carrier liability"* established by the Convention which recognizes different standards of responsibility depending upon whether innocent/negligent air carrier conduct is involved, as compared with circumstances of willful misconduct on the part of the air carrier.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted and that this Court reverse the Second Circuit, and compel the trial court to follow the clear directive of *Lexecon* and remand this matter for further proceedings consistent with this Court's holding therein.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second circuit, held at the United States Courthouse, Foley Square, in the city of New York, on the 28 day of August one thousand nine hundred and ninety-eight.

Singh,

Plaintiff-Appellant,

v. Dkt. No: 97-7428

Pan American World,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in [sic] banc having been filed herein by the appellant Patel, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Kalpana SHAH, Mehul Shah, Utpala M. Desai, Milind Sharad Desai, Narendra R. Desai, Swati N. Desai, Plaintiffs, Sadanand Singh, Individually and as Executor of the Estate of Kala Singh, Deceased, Samir Singh, by and through Sadanand Singh, Guardian Ad Litem, Kalpana Singh, by and through Sadanand Singh, Guardian Ad Litem, Faraidoon Oshtory, Manjula S. Patel, Sangita Patel, Nikita Patel, Individually and as Heirs at Law to Surendra Patel, Deceased, Bakul Shah, Anthony Father Anthony Theodore, Dilip Parekh, Avani B. Shah, Rupal B. Shah, Aisha Begum, Mehboob Kahn, Gayatri Dave, Gargi Dave, minors, by their Guardian Ad Litem, Vinod Dave, Sanjay Patel, a minor, by and through his Guardian Ad Litem, C.N. Patel, Ranjanben Patel, Jayshreeben Patel, minors, by and through their Guardian Ad Litem, Pravin Patel, Khanjan Dalal, Kalpesh Dalal, Deepali Desai, Nagin Patel, Tara Patel, Satish Patel, Govind Patel, Chotubhai Patel, Jamna Patel, Ganga Patel, Ajay Patel, a minor, by and through his Guardian Ad Litem, Parvati Patel, Parvati Patel, Plaintiffs-Appellants,

v.

PAN AMERICAN WORLD SERVICES, INC., Defendant, Pan American World Airways, Inc., Alert Management, a

Florida Corporation, Does 1-50, Defendants-Appellees.

Docket Nos. 97-7428(L), 97-7526(CON), 97-7556(CON), 97-7558(CON), 97-7562(CON), 97-7564(CON), 97-7566(CON), 97-7568(CON), 97-7572(CON), 97-7574(CON) and 97-7576(CON).

United States Court of Appeals,
Second Circuit.

Argued March 13, 1998.
Decided June 15, 1998.

Before: CARDAMONE, WALKER and MAGILL,[1] Circuit Judges.

WALKER, Circuit Judge:

Plaintiffs-appellants Sadanand Singh, et al., appeal from the March 24, 1997 judgment of the United States District Court for the Southern District of New York (John E. Sprizzo, District Judge) after jury trial, entered pursuant to Fed.R.Civ.P. 50, 54(b), and 58, capping each appellant's recovery at $75,000 under the Convention for the Unification of Certain Rules Relating to International Transportation by

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[1]The Honorable Frank J. Magill, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Air, Oct. 12, 1929, 49 Stat. 3000, TS No. 876 (1934), reprinted in 49 U.S.C.A. § 40105 (1997) ("Warsaw Convention" or "Convention"); dismissing various California State law claims brought by plaintiffs-appellants Sadanand Singh, individually and as executor of the Estate of Kala Singh, and Samir and Kalpana Singh, through a guardian ad litem (collectively, the "Singh plaintiffs"); and dismissing the Singh plaintiffs' motion, pursuant to 28 U.S.C. § 1404(a), to transfer venue to the Southern District of California for trial on the state claims and on Warsaw Convention claims relevant only to the Singh plaintiffs (collectively, the "non-common" claims). *See Singh v. Pan American World Airways, Inc. (In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi Int'l Airport, Pakistan on Sep. 5, 1986)*, 920 F.Supp. 408, 415 (S.D.N.Y.1996) "*Karachi* ").

This case arises out of the tragic September 1986 hijacking of Pan Am Flight 73 in Karachi, Pakistan, that led to approximately twenty deaths and numerous other injuries. The case presents the issue of whether fraudulent misrepresentation can constitute "wilful misconduct" within Article 25(1) of the Convention and, if it can, what causation as between the fraud and plaintiffs' damages is required. We also address the threshold question of whether the recent Supreme Court decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, --- U.S ---, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998)-- requiring cases transferred under 28

U.S.C. § 1407 to be remanded to the transferor courts at the conclusion of pre-trial proceedings--applies as a general matter to plaintiffs' actions and, if *Lexecon* does apply, whether it should apply retroactively in this case.

Affirmed.

Background

In 1986, in response to public concern over terrorism on international airline flights, Pan American World Airways, Inc. ("Pan Am") contracted with Alert Management Systems, Inc. ("Alert") to provide a security system for its international flights. Pan Am thereafter advertised its Alert program, making various representations to the public about improved airport security that either had already been implemented or would be implemented by Pan Am. The Singh plaintiffs (but none of the other plaintiffs-appellants) allege that they saw Pan Am's advertisements and relied upon the representations of improved security therein in deciding to fly on Pan Am Flight 73. On September 5, 1986, Pan Am Flight 73 departed Bombay, India, en route to New York, New York, with a scheduled intermediary stop at Karachi International Airport in Karachi, Pakistan. While Flight 73 was on the ground at Karachi International Airport, armed hijackers drove a vehicle through a gate onto the airport tarmac, boarded the aircraft, and eventually opened gunfire on its passengers, killing some twenty passengers and injuring numerous others.

Plaintiffs-appellants are either passengers who were injured or representatives of passengers who were killed as a

result of the hijacking. On February 23, 1987, the Singh plaintiffs filed an action against defendants in the Southern District of California asserting claims under the Warsaw Convention and California state law for the personal injury and death suffered on board Pan Am Flight 73. Numerous other actions relating to the hijacking of Pan Am Flight 73 were filed against Pan Am in various courts across the United States. With the exception of the action entitled *Ganga Bahn v. Pan American World Airways, Inc.*, No. 87-CV-0547, all of these actions originated in courts other than the Southern District of New York ("Southern District") and in 1987 and 1988 were transferred by the multidistrict litigation panel ("MDL panel") to the Southern District for consolidated pre-trial proceedings under 28 U.S.C. § 1407. In December 1993, the Southern District granted Pan Am's motion to transfer and consolidate all of the actions for trial in that court.

On April 14, 1994, after a six-week jury trial of plaintiffs' Warsaw Convention claims, the jury returned a special verdict answering the following four questions:

1) Do you find by a fair preponderance of the evidence that Pan Am [ ] engaged in wilful misconduct, as defined by the Court, in connection with the Alert Security Program? The jury answered "yes."

2) Do you find by a fair preponderance of the evidence that Pan Am[ ] engaged in wilful misconduct, as defined by the Court, by flying into Karachi International Airport on September 5, 1986?

The jury answered "no."

3) If the answe Question # 1 is Yes, do you find by a fair preponderance f the evidence that the wilful misconduct of Pan Am [ ], in connection with the Alert Security Program, was a proximate cause of the hijacking?
The jury answered "no."

4) If the answer to Question # 2 is Yes, do you find by a fair preponderance of the evidence that the wilful misconduct of Pan Am [ ], by flying into Karachi International Airport on September 5, 1986, was a proximate cause of the hijacking?
The jury did not answer.

The jury found therefore that defendants had not committed wilful misconduct by flying into Karachi, a claim common to all plaintiffs. It is not clear, however, why the district court submitted questions # 1 and # 3 to the jury as claims common to all of the plaintiffs, since defendants' alleged fraudulent misrepresentations could be relevant only to plaintiffs such as the Singh plaintiffs who, at minimum, were aware of defendants' advertisements about the Alert security program. Finally, the district court did not submit to the jury the question of whether defendants' inadequate security itself constituted wilful misconduct, in all likelihood because little if any evidence indicated that defendants had any power to control the level of security at Karachi International Airport.

On February 14, 1996, almost two years after the

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jury's verdict, the district court denied the Singh plaintiffs' motion, pursuant to 28 U.S.C. § 1404(a), to transfer back to the Southern District of California their remaining noncommon California law claims and their fraudulent misrepresentation claim under the Convention. *See Karachi*, 920 F.Supp. at 415. The district court then dismissed the Singh plaintiffs' state claims as preempted by both the Warsaw Convention and the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1305(a)(1) (1993), reconstituted in 49 U.S.C. § 41713(b)(1), and dismissed their fraudulent misrepresentation claim as barred by the jury's special verdict. *Karachi*, 920 F.Supp. at 414. On March 24, 1997, the district court entered final judgment, pursuant to Fed.R.Civ.P. 50, 54(b), and 58, awarding plaintiffs damages within the limitations imposed. It refused to award damages in excess of those limits because--as per the jury's special verdict--plaintiffs had failed to establish either defendants' wilful misconduct or the requisite causation between such misconduct and their damages.

Plaintiffs-appellants appeal from that judgment. In particular, the Singh plaintiffs contend that (1) notwithstanding the jury's special verdict, they are entitled to bring their fraudulent misrepresentation claim under the Convention, and (2) they are entitled to bring their California state law claims in addition to their Warsaw Convention claim. All of the plaintiffs-appellants also request a new trial on the basis that the district court's alleged misconduct during

trial prejudiced the jury and that the court improperly refused to qualify as an expert one of plaintiffs' proffered witnesses.

Discussion

I. Remand Under 28 U.S.C. § 1407

We first address the threshold issue of whether the Supreme Court's recent decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, --- U.S ---, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998), requires this court to vacate the district court's judgment as to all plaintiffs and remand all of the actions to the transferor courts from which the MDL panel transferred each action pursuant to 28 U.S.C. § 1407.

With the exception of Ganga Bahn, No. 87-CV-0547, all of the appellants' actions originated in courts other than the Southern District and were transferred in 1987 and 1988 to the Southern District by the MDL panel pursuant to 28 U.S.C. § 1407 § 1407"), which states:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such

> actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated. . . .

(Emphasis added). In 1993, over the objections of all of the plaintiffs, defendants moved to transfer the actions to the Southern District for a consolidated liability trial, pursuant to 28 U.S.C. § 157(b)(5) (" § 157(b)(5)")--a bankruptcy statute--or alternatively, pursuant to 28 U.S.C. § 1404(a) (" § 1404(a)")--a general venue statute. On December 13, 1993, the district court granted defendants' motion to transfer "for the reasons stated at [the] Oral Argument" of December 10, 1993, but did not state whether it was relying on § 157(b)(5) or § 1404(a). The parties have not furnished a transcript of that oral argument and it is not a part of the record on appeal. A 1994 joint pre-trial order signed by the district court and lead counsel for both parties, however, states that "all actions have been transferred to [the Southern District], pursuant to Title 28 United States Code, § 1404(a), for the trial of all common liability issues," and therefore it appears that the district court did transfer the actions pursuant solely to § 1404(a). In 1994, following trial and prior to the district court's entry of judgment, the Singh plaintiffs moved, pursuant to § 1404(a), to transfer their action back to the Southern District of California--a motion denied by the district court in 1996. *See Karachi*, 920 F.Supp. at 415.

In *Lexecon*, the Supreme Court held that a district court to which cases have been transferred pursuant to § 1407 for pretrial proceedings cannot, after conclusion of the pretrial proceedings, transfer the case to itself for trial under § 1404(a). *See* --- U.S. at ---, 118 S.Ct. at 959. Because the plain language of § 1407 dictates that "[e]ach action ... transferred [under § 1407] shall be remanded by the [MDL] panel at or before the conclusion of ... pretrial proceedings," 28 U.S.C. § 1407(a), the Court reasoned that "no exercise in rulemaking can read that obligation out of the statute." *Lexecon*, --- U.S. ---, at 118 S.Ct. at 963.

Defendants respond with four arguments each of which, if accepted, could independently bar application of Lexecon: (1) that the district court transferred the action to itself for trial pursuant to § 157(b)(5) and not § 1404(a), and therefore Lexecon does not apply; (2) that even if the district court did transfer pursuant to § 1404(a), it could have transferred pursuant to § 157(b)(5) and, again, Lexecon would not apply; (3) that even if Lexecon is applicable as a general matter, it should not be applied retroactively in this case; and (4) that plaintiffs failed to preserve their Lexecon remand right by failing to request a remand under § 1407 or to object properly to the district court's transfer of venue.

A. Lexecon's Applicability to Section 157(b)(5)

We note first that the district court did transfer plaintiffs' action pursuant to § 1404(a) and not § 157(b)(5).

Even assuming, however, that we may look to whether venue was sustainable under another legal basis such as § 157(b)(5), and assuming that venue in this action would have been sustainable under § 157(b)(5)--both issues as to which we express no opinion-it appears that *Lexecon* should apply to § 157(b)(5) transfers as well as to § 1404(a) transfers. Although *Lexecon*'s holding applies explicitly only to § 1404(a)-the only statute under which the transferee district court in that case purported to transfer venue--*Lexecon's* reasoning applies equally to transfers pursuant to any venue statute. *Lexecon* recognizes that "no exercise in rulemaking can read... out of the statute" the MDL panel's obligation to remand each action to its respective transferor court at or before the conclusion of pretrial proceedings. *Id.* (emphasis added). *Lexecon* does not preclude later consolidation of multiple suits for trial after they have first been returned to the district courts from which they came. "[O]n any view of § 1407(a), if an order may be made under § 1404(a), it may be made after remand of the case to the originating district court." *Id.* at 118 S.Ct. at 964 (footnote omitted) (emphasis added). Indeed, *Lexecon* observes that § 1407

> affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes [such as § 157(b)(5)]. . . . The subsection requires that transferred cases be remanded to the

> originating district at the close of coordinated pretrial proceedings.

Id. (quoting H.R.Rep. No. 90-1130, at 3-4 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1900-01). Rather, posing "[t]he relevant question . . . [of] whether a transferee court, and not a transferor court, may grant . . . a motion [for transfer of venue]," the Court concluded that "self-assignment is beyond the scope of the transferee court's authority." *Id.*

We also note that *Lexecon* is not premised upon the belief that § 1404(a) does not itself permit self-transfer (whereas, as defendants may claim, § 157(b)(5) does). *Lexecon* explicitly leaves unresolved the issue of whether § 1404(a) permits self-transfer *See id.* at ---- n. 4, 118 S.Ct. at 964 n. 4. In short, *Lexecon* and § 1407 require that the MDL panel remand to the transferor court any action "at or before the conclusion of . . . pretrial proceedings," and any further transfers of venue for trial under any statute must follow such remand. Whether, after remand to the transferor court, a court has the power to transfer venue to itself under § 1404(a) or § 157(b)(5) is a separate issue that we have no need to decide.

B. Retroactivity of *Lexecon*

We next turn to whether *Lexecon* should be applied retroactively in this case.

> When [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law

> and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). *Harper*, however, did not require retroactive application where the Supreme Court explicitly " 'reserve[s] the question whether its holding should be applied to the parties before it.' " *Id.* (*quoting James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 539, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991)). *Lexecon* is such a case. Responding to respondent's nonretroactivity argument, the Court concluded that it was "unnecessary for [it] to consider" that issue because it was not presented to the lower courts or in opposition to the certiorari petition. *See Lexecon*, --- U.S. at ---- n. 5, 118 S.Ct. at 965 n. 5. The Court then remanded the case for further proceedings. We therefore apply the three factor retroactivity analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971):

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, ... we must ... look[ ]

> to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Id. at 106-07, 92 S.Ct. 349 (citations and quotation marks omitted).

Because *Lexecon* "reverse[d] the longstanding practice under [§ 1407]," --- U.S. at ---, 118 S.Ct. at 962; *see, e.g., Pfizer, Inc. v. Lord*, 447 F.2d 122, 122-25 (2d Cir.1971), it is unquestionable that *Lexecon* "overrul[ed] clear past precedent on which litigants may have relied. " Second, retrospective application of *Lexecon* would frustrate the "essential [sic] purpose of section 1407 to 'promote the just and efficient conduct' of complex multidistrict litigation." *Pfizer*, 447 F.2d at 125 (quoting 28 U.S.C. § 1407(a)); *see Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) (section 1407 is one method "by which the burdens of multiple lawsuits may be avoided"). In the instant case, this primary concern outweighs the subsidiary concern of § 1407 to "favor ... [the] plaintiffs' choice of forum." Lexecon, --U.S. ---, at 118 S.Ct. at 960. In 1993, the

transferee district court transferred the actions to itself for trial; in 1994, that court held a six-week jury trial; and *Lexecon* was not decided until March 1998, nearly a year after the judgment of the district court and ten days before oral argument in this court. Retroactive application of *Lexecon* would require remand of each action to its respective transferor court, with the possibility that some or all of the actions will not be re-transferred to the Southern District. If this should happen, the jury's special verdict will be of no effect as to some or all of the actions, which would then have to be retried, possibly separately. Retroactive application could therefore lead to an enormous waste of judicial resources, precisely the result Congress sought to avoid by enacting § 1407. At least when a trial has been completed and final judgment has been entered, as in the instant case, the second *Chevron* factor weighs heavily in favor of non-retroactive application.

As to the third *Chevron* factor, which weighs the equities of retroactive application, the Supreme Court has recently observed that "we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Harper*, 509 U.S. at 97, 113 S.Ct. 2510 (alterations in original) (quoting *Beam*, 501 U.S. at 543, Ill S.Ct. 2439). This factor may therefore be of little, if any, effect. Assuming that the third factor is no longer

valid, we easily hold that the first two *Chevron* factors in this case preclude Lexecon 's retroactive application. To the extent that the third *Chevron* factor still has force, the equities still favor not applying *Lexecon* in this case. After twelve years of litigation, the parties have an interest in resolution of the fundamental issues in this case and, if we so decide, a final judgment from this court.

Because we hold that *Lexecon* does not apply retroactively to the instant action, we do not address whether either the Singh or the non-Singh plaintiffs waived their right to a remand under § 1407. *See Lexecon*, --- U.S. at ---, n. 1, 118 S.Ct. at 962 n. 1.

II. Warsaw Convention Claim

We next turn to the merits of appellants' Warsaw Convention claim. The Convention applies "to all international transportation of persons, baggage, or goods performed by aircraft for hire," Convention, art. 1, and governs the liability of international air carriers for damages resulting from an "accident," Convention, art. 17, which has been interpreted to include hijacking or terrorist activity. *See Pflug v. Egyptair Corp.*, 961 F.2d 26, 29 (2d Cir.1992). Under Article 17 of the Convention,

> [t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident

> which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 22 of the Convention, as modified by the Montreal Agreement,[2] limits the liability created by Article 17 "for each passenger for death, wounding, or other bodily injury [to] $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit [shall be] $58,000 exclusive of legal fees and costs." Defendants have conceded liability and the district court entered judgment against defendants for damages within the limits prescribed by Article 22 as modified.

Article 25(1) of the Convention as translated, however, provides that

> [t]he carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or

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[2]The Montreal Agreement, otherwise known as the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol Agreement CAB 18990, applies where (as in the instant case) the flight itinerary includes a stop in the United States. Pan Am is a signatory to the Montreal Agreement, a private agreement that has been approved by the United States government by Exec. Order No. 23,680, 31 Fed.Reg. 7,302 (1966).

> by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

The Singh plaintiffs claim that the district court improperly capped defendants' liability to the limits prescribed by Article 22 as modified because defendants' misrepresentations on the subject of improved airport security constitute "wilful misconduct" within Article 25(1) and caused them damage. This claim, sharply contested by defendants, is a principal issue of this appeal.

A. Fraudulent Misrepresentation as "Wilful Misconduct"

As a preliminary matter, defendants maintain that the district court erred when it held that fraudulent misrepresentation by an air carrier can itself constitute "wilful misconduct" within Article 25(1) of the Convention. Defendants claim that such a holding "transform[s] the Convention into an international agreement that imposes liability on air carriers for allegedly false or fraudulent advertising," and undermines the desired uniformity of the Convention's liability scheme by "allow[ing] those passengers who have 'relied' on fraudulent advertising to recover amounts in excess of the generally applicable limits of the Convention, while other passengers who suffered equal or greater injuries in the same accident would not." The Singh plaintiffs respond that the Convention was not designed to "insulate an airline

from the consequences of its own fraud," and that " where the wilful misconduct consists of fraudulent statements made before the flight to lure passengers onto the aircraft, it is only logical that the misconduct can affect different passengers differently, and that they may have different claims based on their individual circumstances. "

"Wilful misconduct under the Convention means that a carrier must have acted either 1) with knowledge that its actions would probably result in injury or death, or 2) in conscious or reckless disregard of the fact that death or injury would be the probable consequence of its actions." *Pagnucco v. Pan American World Airways, Inc.* (*In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*), 37 F.3d 804, 812 (2d Cir.1994) ("*Lockerbie II* ").[3] The district court defined wilful misconduct for the jury as making false statements either knowingly or "with no basis in fact or with reckless disregard of the truth" and with awareness that defendants' "fail[ure] to act in the way they promised to do" was "likely to cause injuries to passengers." *See* Trial Tr. at 2750, 2762. It is unclear to us why, as defendants contend, fraudulent misrepresentations as to the state of an airline's security should enjoy unique status as non-wilful misconduct within Article 25. Indeed, we recognized such wilful misconduct in *Lockerbie II*, 37 F.3d at 822 (admitting, as proof of misconduct, "proof regarding the 'Alert' Security Program

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[3]We discuss the causation aspect of wilful misconduct in part II(B), below.

reveal[ing] first, that it was neither related to security, nor was it a program. Instituted by Pan Am in May 1986 during a period of sharp decline in international travel due to terrorist attacks, the program was a misleading public relations ploy designed to make would-be travelers feel more secure. "). The Convention's uniformity principle, moreover, plainly does not require equal treatment of all passengers injured by an aviation accident where only a subset of those passengers were injured as a result of the carrier's wilful misconduct--here, Pan Am's fraudulent misrepresentations.

B. Causation

Our conclusion that fraudulent misrepresentation can constitute "wilful misconduct" leads to the much more difficult question of what causal nexus must be shown between the misrepresentation and plaintiffs' damages. We therefore determine first, the proper standard for causation under the Convention and second, whether the jury's special verdict precludes a finding of causation under that standard.

(1) Proper Standard of Causation. Article 25 of the Convention which, as noted, removes the liability limitation of Article 22, speaks only generally to causation: liability exists where the plaintiffs' "damage is caused by [the carrier's] wilful misconduct. " Challenged to find the test for causation in fraudulent misrepresentation cases, a matter the Convention leaves unresolved, the Singh plaintiffs suggest a winding path to that conclusion. They argue that, in the

absence of a prescribed test for causation in fraudulent misrepresentation cases, the Convention derogates that issue to another source of law-here United States law, *see Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 227-28, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996); that *Zicherman* forbids creation of a federal common-law rule of causation, *see id.* at 230-31, 116 S.Ct. 629; that, in the absence of federal statute, the controlling law (including choice of law rules) is that of the forum jurisdiction, *see Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1030 (2d Cir.1996), *cert. denied*, --- U.S ---, 117 S.Ct. 959, 136 L.Ed.2d 845 (1997); that where there has been a change of venue, the forum jurisdiction is where the action has been filed--here the Southern District of California, *see Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964); that California's choice of law rules therefore determine which substantive law applies, *see Valley Juice Ltd. v. Evian Waters of France, Inc.*, 87 F.3d 604, 607 (2d Cir.1996); that under California's if governmental interests" approach to choice of law rules, California law would apply, *see Reich v. Purcell*, 67 Cal.2d 551, 555-56, 63 Cal.Rptr. 31, 432 P.2d 727 (1967); and that California law prescribes a causal nexus between wilful misconduct and damages that is weaker than the causation test used by the district court. *See Garcia v. Superior Court of Santa Clara County*, 50 Cal.3d 728, 737, 268 Cal.Rptr. 779, 789 P.2d 960 (1990). We disagree.

Article 24 of the Convention states that any action for

damages under Article 17 "can only be brought subject to the conditions and limits set out in this convention. " Convention, arts. 24(1), 24(2). We believe that this means that unless the Convention reserves an issue for determination by the law of another jurisdiction, the law of the Convention--not federal common law, state law, or any other law of the forum court--applies. Unlike in this case, the Convention articles at issue in both *Zicherman* and *Brink's* suggested that the critical questions in those cases were to be decided according to the law of other fora. In determining whether loss of society damages, resulting from the death of a relative in a plane crash on the high seas, were recoverable, *Zicherman* looked to Article 24(2), which states that Article 24 applies "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." *Zicherman*, 516 U.S. at 224-25, 116 S.Ct. 629. *Zicherman* therefore concluded that "the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for," and looked to United States law to determine the result. *Id.; see also Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 8 (2d Cir.1996). Similarly, in determining whether theft by an employee acting within the scope of employment constitutes "wilful misconduct," *Brink's* looked to the law of the forum jurisdiction, as contemplated by the specific language of Article 25(1), which applies to "wilful misconduct or [ ] such default ... as, in accordance with the law of the court to which

the case is submitted, is considered to be equivalent to wilful misconduct." *See Brink's*, 93 F.3d at 1028-29.

The Convention "was intended to serve as a uniform, international law" and one of its central purposes was "to establish uniformity in the aviation industry with regard to . . . the substantive law applicable" to claims "arising out of international transportation." *Rein v. Pan American World Airways Inc. (In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*), 928 F.2d 1267, 1270, 1280 (2d Cir.1991) ("*Lockerbie I* ") (quotation marks omitted). Unless otherwise indicated by the Convention, application of various rules of substantive law on the same question, depending on the state in which an action was brought and that state's choice of law rules, tends to undermine the Convention's uniformity principle. Because no provision of the Convention suggests that the issue of causation should be decided according to the law of another jurisdiction, we look to "the conditions and limits set out in this convention." Convention, art. 24(1).

The issue of the standard of causation applicable in fraud-based "wilful misconduct" cases under the Convention is apparently one of first impression in the United States. In interpreting the Convention, we therefore "begin with the text of the treaty and the context in which the written words are used," and if necessary to "ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-

35, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991) (quotation marks omitted).

Article 25 of the Convention, as translated, applies where the plaintiffs' "damage is caused by [the carrier's] wilful misconduct. " Where fraudulent misrepresentation constitutes the "wilful misconduct," the causation language of Article 25 is susceptible to three interpretations. First, to the extent a plaintiff reasonably relies on a misrepresentation and is thereby induced to board an airplane that is hijacked--leading plaintiff to suffer injury--the misrepresentation could be said to have "caused" plaintiff's injury, or "damage." We believe that this "but for" or "factual" causation is insufficient to establish the causation required by Article 25. It cannot credibly be maintained, for example, that where a plaintiff reasonably relies upon an airline's fraudulent misrepresentations of good meals, padded seats, and ample leg room and the plaintiffs plane is then hijacked and the plaintiff injured, that the misrepresentation--by causing the plaintiff to board the plane--in any way "caused" plaintiff's injuries as defined by Article 25. At oral argument, the Singh plaintiffs conceded the untenability of such a factual causation theory.

A second interpretation--the one urged by the Singh plaintiffs on appeal--would define causation as both reasonable reliance on the misrepresentation inducing passengers to use a carrier and a reasonable relationship between the injuries and the representations relied upon.

Because the Singh plaintiffs were allegedly induced by Pan Am's misrepresentations of improved security to fly Pan Am and because one of the purposes of such security was to prevent hijackings such as the one that caused plaintiffs' injuries, the Singh plaintiffs contend that Pan Am's misrepresentations "caused" their damage. If, however, Pan Am's institution of the Alert program as promised would not have prevented the hijacking of Pan Am Flight 73, then the representation cannot have "caused" plaintiffs' injuries any more than the failure to serve a promised meal under the first interpretation, and any "reasonable relationship" between the representations and the injuries would be purely coincidental. The Convention's "clearly [ ] overriding purpose--to limit air carriers' potential liability in the event of accidents," *see Lockerbie I*, 928 F.2d at 1270, would be undermined if air carriers were held liable for damages that would have occurred regardless of whether or not the carrier's representations of improved security were ultimately performed as promised. We therefore reject this second, "reasonable relationship" formulation of causation as well. Rather, we believe that to establish Article 25(1), causation for fraud-based wilful misconduct claims, the Convention requires plaintiffs to prove by a preponderance of the evidence first, that their reasonable reliance on the fraudulent misrepresentations induced them to use the carrier and second, that the damages would not have occurred if the carrier had performed as promised. In the instant case,

therefore, defendants would not be liable under Article 25(1) if, assuming they had instituted the Alert security program as represented to the Singh plaintiffs, the hijacking would still have occurred.

(2) The Jury's Special Verdict.

Our next inquiry is whether the special verdict form and jury charge properly applied the test elucidated above, in which case the jury's special verdict would dispose of the causation issue and require dismissal of the Singh plaintiffs' Warsaw Convention claims. "The formulation of special verdict questions rests in the sound discretion of the trial judge, and should be reviewed by an appellate court only for an abuse of that discretion." *Vichare v. AMBAC Inc.*, 106 F.3d 457, 465 (2d Cir. 1996). "Reversal is warranted if the questions mislead or confuse the jury, or if they inaccurately frame the issues to be resolved by the jury." *Id.* However, the court's special verdict questions "must be read in conjunction with the judge's charge to the jury." *Id.* at 466.

The special verdict form in the instant case asked the question: "[D]o you find by a fair preponderance of the evidence that the wilful misconduct of Pan American World Airways, Inc., in connection with the Alert Security Program, was a proximate cause of the hijacking?" to which the jury answered "no." This somewhat ambiguous special verdict form--asking whether the wilful misconduct in connection with the Alert program proximately caused the hijacking-could have left some room for misinterpretation by the jury.

An advertising program plainly cannot "cause" a hijacking and it is not inconceivable that the jury could have rejected a finding of causation on this basis. The special verdict form should have asked: "Had Pan Am instituted the security as promised in its Alert Security Program, would the hijacking--and therefore plaintiffs' injuries--have occurred?"

However, the district court's jury charge as to causation stated:

> Proximate cause means that the willful misconduct of Pan Am was a substantial contributing factor in bringing about the hijacking. . . . Obviously we know that the conduct of the hijackers caused the hijacking to a large extent. So the plaintiffs do not have the burden of proving that the willful misconduct of Pan Am was the sole cause of the accident. . . . [I]f this hijacking would have occurred in any event regardless of whether Pan Am was guilty of willful misconduct or not, then proximate cause would not be shown. . . . If it was not a contributing factor in the sense that even if the willful conduct had not taken place, the hijacking would have happened anyway, . . . that even if all the security arrangements had been put in place as represented by Pan Am, even if they had done everything they said they were supposed to

> do, the hijacking would have occurred anyway, then plaintiffs would not have carried the burden of showing that it is a proximate cause.

Trial Tr. at 2763-64 (emphasis added). This jury charge did clarify the special verdict form by stating that the jury could not find causation if "the hijacking would have occurred" "even if all the security arrangements had been put in place as represented by Pan Am, even if they had done everything they said they were supposed to do." In light of plaintiffs' failure to request a more precise charge consistent with our earlier discussion of the law, their failure to object to the district court's proposed special verdict form, *see* Trial Tr. at 2543-44, and their concession before the district court that in fact the jury was "asked whether or not [the hijacking] would have happened if [defendants] did everything that was promised," Tr., March 10, 1995, at 11, we find that the jury instructions, taken as a whole, were not sufficiently misleading or ambiguous as to constitute plain error. *See United States v. Ciak*, 102 F.3d 38, 45 (2d Cir.1996) (applying plain error review where party failed to object to jury charge). In the context of the jury instructions that were given, the jury's special verdict precludes any finding of causation as to the Singh plaintiffs' fraudulent misrepresentation claim under the Warsaw Convention.

C. "Causes" v. "Arises From"

The Singh plaintiffs also challenge the district court's special verdict form and jury charge on the theory that the Article 25(1) causation test in the official American and British translations of the Warsaw Convention is mistranslated and improperly requires a stronger nexus between wilful misconduct and damage than does the test as set out in the original French text. The Singh plaintiffs note, correctly, that "[b]ecause the only authentic text of the Warsaw Convention is in French, the French text must guide our analysis." *Eastern Airlines*, 499 U.S. at 535, 111 S.Ct. 1489. The official French text of Article 25(1) reads: "si le dommage provient de son," which the Singh plaintiffs claim to mean "if the damage arises out of " and not "if the damage is caused by" the wilful misconduct. They note further that Article 17, which in the American translation establishes carrier liability where an "accident ... caused the damage," reads "cause le dommage " in the official French text. After the jury returned its special verdict, the Singh plaintiffs presented to the district court the uncontroverted declaration of their French legal expert, Professor Alain Levasseur, that "provient de son" means "arises from" in the context of Article 25(1). The Singh plaintiffs maintain that because, under the proper translation of Article 25(1), their damages would only have to "arise from" Pan Am's fraudulent misrepresentation, the jury's special verdict as to causation does not now preclude their fraudulent misrepresentation claim.

Defendants respond that, because Article 17--creating the carrier's liability--requires proximate cause, plaintiffs' reading of Article 25 is illogical because it would "allow recovery of unlimited damages for an act of wilful misconduct that could not, in the first instance, have supported a finding of liability under Article 17." This argument misses the fact that Article 17 requires proximate causation as between the "accident " and plaintiffs' "damage," while Article 25, under plaintiffs' reading, would require the looser "arising from" causation only as between defendants' "wilful misconduct and plaintiffs' "damage." (Emphasis added). This interpretation appears to reconcile the inconsistent standards of causation by attributing them to differing levels of culpability.

Defendants next observe that no United States court has ever questioned the American/British translation of Article 25(1) as it relates to causation. "Age [, however,] is no antidote to clear inconsistency with a statute," or a treaty. Lexecon, --- U.S. at ---, 118 S.Ct. at 962 (quoting *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300, 115 S.Ct. 2144, 132 L.Ed.2d 226 (1995)). Defendants note, finally, that Article 25(2), which as translated states that a carrier may not avail itself of liability limitations "if the damage is caused [by the wilful misconduct of] any agent of the carrier acting within the scope of his employment," reads "a ete cause" in the original French text. (Emphasis added). Defendants reason that the Convention did not contemplate

"different standards of causation ... depending on whether the party engaging in wilful misconduct [was] the air carrier itself or its agent. "

We note that the Singh plaintiffs' translation error argument logically applies not just to fraudulent misrepresentation but to all wilful misconduct claims. Because plaintiffs did not object to the jury charge or special verdict form on this ground until after the jury's special verdict, however, we do not resolve this translation error issue except to hold-upon the limited record before us--that the district court's instructions were not plain error. Plaintiffs' argument based on the French text, while not without substance, is one that the district court could not have anticipated given the state of the law. *See Ciak,* 102 F.3d at 45 (applying plain error review where party failed to object to jury charge). Plaintiffs' own requested jury charge asked "whether the wilful misconduct was a proximate cause of the hijacking and the injuries and deaths of the passengers," and their requested special verdict form asked whether Pan Am's wilful misconduct was "a cause" of plaintiffs' damages. We therefore leave to another day whether "provient de son" in Article 25(1) is properly translated as "is caused by" or "arises from," (and, if the latter, its significance), an issue of apparent first impression in this country.

III. State Law Claims

The Singh plaintiffs' common law claims for

rescission, negligence, wrongful death, conspiracy to defraud, breach of contract, and fraud are all preempted by the Warsaw Convention. It is now well-established that "[a]ll state law claims that fall within the scope of the Convention are preempted." *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 141 (2d Cir. 1998) (citing *Lockerbie I*, 928 F.2d at 1273); *see Coker v. Pan American World Airways, Inc. (In re Pan American Corp.)*, 950 F.2d 839, 847 (2d Cir, 1991) (transferee court in Second Circuit must apply preemption law as construed by the Second Circuit). This is because the Convention

> had two primary goals: first, to establish uniformity in the aviation industry with regard to the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims . . . [and] second-clearly the overriding purpose--to limit air carriers' potential liability in the event of accidents.

Lockerbie I, 928 F.2d at 1270 (quotation marks omitted). Moreover, "[t]he existence of the state causes of action would not only result in the inconsistent application of law to the same accident, but also would cause enormous confusion for airlines in predicting the law upon which they would be called to respond." *Id.* at 1276. All of the Singh plaintiffs' common law claims are "within the scope" of Article 17 of the Convention, in that they all seek damages for "the death or

wounding of a passenger or any other bodily injury suffered by a passenger" caused by an "accident . . . on board [an] aircraft" in international transportation. Convention, arts. 1, 17; *see Fishman*, 132 F.3d at 141.

Because all of the Singh plaintiffs' common law claims are preempted by the Warsaw Convention, we have no need to address the second arrow in defendants' preemption quiver: the questionable contention that somehow all of plaintiffs' state claims implicate state laws or regulations "having the force and effect of law relating to rates, routes, or services of any air carrier," and are therefore preempted by the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1305(a)(1) (1993), reconstituted in 49 U.S.C. § 41713(b)(1). *See generally American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

IV. Challenge to the Trial Judge's Conduct

All of the plaintiffs argue that the trial judge committed reversible error by improperly questioning witnesses before the jury. In reviewing a challenge to a trial judge's conduct, we determine not "whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid[, but] . . . whether the judge's behavior was so prejudicial that it denied [a party] a fair, as opposed to a perfect, trial." *United States v.*

Rosa, 11 F.3d 315, 343 (2d Cir.1993) (quotation marks omitted). Our statement of this legal standard in no sense should be taken to detract from our counsel that, of course, "a court must strive for 'that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding,'" *Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265, 273 (2d Cir.1996) (quoting *Glasser v. United States*, 315 U.S. 60, 82, 62 S.Ct. 457, 86 L.Ed. 680 (1942)), and "must be especially cautious and circumspect in language and conduct during a jury trial. " *Id.* (quotation marks omitted). Although "asking numerous and probing questions of witnesses" is "unquestionably proper," a "trial judge should limit questioning to inquiries necessary to clarify ambiguities, correct misstatements, or obtain information necessary to make rulings," *United States v. Manko*, 979 F.2d 900, 905 (2d Cir.1992), and "[w]e will reverse on the basis of a judge's improper remarks if the judge expresses [his] opinion on an ultimate issue of fact in front of the jury or [argues] for one of the parties." *Causey v. Zinke* (*In re Aircrash in Bali, Indonesia*), 871 F.2d 812, 815 (9th Cir.1989) (alteration in original) (quotation marks omitted). "[I]t is only after an examination of the entire record," however, "that we can come to a conclusion about the conduct of the district court." *Manko*, 979 F.2d at 905-06 (quotation marks omitted).

Of the many examples cited by plaintiffs, the trial judge's conduct in the jury's presence was troublesome only in the judge's questioning of plaintiffs' principal airport

security expert, Isaac Yeffet, a former head of El Al security, as follows:

THE COURT: Do you have an opinion as to what the state of security was at Karachi Airport on September 5, 1986?
THE WITNESS: Yes, sir.
THE COURT: What is that opinion? THE WITNESS: That if terrorists--
THE COURT: No, no, what is that opinion -- not if, not hypothetically what could happen -- as to the state of security at that airport?
THE WITNESS: That they cannot near the aircraft stop terrorists who is [sic] coming to attack or to hijack the aircraft.
THE COURT: That is not an opinion. That is just your statement that they couldn't prevent what happened.
THE WITNESS: That's right.
THE COURT: I take it you have very good security on the West Bank, isn't that correct, in Israel?
THE WITNESS: Yes, your Honor.
THE COURT: Troops all over the place?
THE WITNESS: Yes.
THE COURT: Somebody went into a mosque and shot 60 people. So what I am saying to you is, I ask you for your opinion of the nature of security. Was it good, bad, or indifferent? That is what I want to know. That is what they need to know.

THE WITNESS: Your Honor, very bad.

Trial Tr. at 1057-58. The trial judge's reference to the Hebron massacre,[4] while arguably a legitimate effort to draw a proper expert opinion from Yeffet, could also have improperly suggested to the jury that, if "very good security on the West Bank" could not prevent the Hebron massacre, then the Pan Am hijacking would have occurred even had Pan Am fulfilled its promises of improved security. The trial judge compounded this error when, in response to Yeffet's contention that Pan Am should have had more armed guards surrounding the plane on the tarmac, the district court stated:

THE COURT: [Y]ou are an expert in this field, but I have flown and I am sure other people have flown. I don't have any recollection of having seen armed guards in most of the airplanes I have flown in that are flown by airlines. What I am asking you is this: As of September 5, 1986, was it common practice for airlines at that time to have armed guards, their own paid armed guards in the terminal, in the airport?
THE WITNESS: They had armed guards -
THE COURT: But were they employed by the airlines or were they soldiers?
THE WITNESS: No, they were from the local authorities, and some of them that had air marshals, they were on the spot

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[4]On February 24, 1994, an armed gunman killed a number of people in a mosque in Hebron on the West Bank.

until their aircraft took off.

THE COURT: But would it be fair to say that most airlines at September 5, 1986, did not employ armed guards to patrol the airline terminals? Is that true?

THE WITNESS: I cannot say most of them employed. But I can say that the local authorities, with the cooperation with the head of security of those airlines, they provide them armed guards to secure their flight.

THE COURT: But normally the armed guards, the people who patrol the terminals, are supplied by the local military authorities or local civilian authorities?

THE WITNESS: Correct.

THE COURT: At least that is what I have seen, and tell me if I am right.

THE WITNESS: You are correct.

Id. at 1062-63. Apparently disbelieving Yeffet's expert opinion that Pan Am should have employed armed guards and that such armed guards may have prevented the hijacking, the trial judge continued to question Yeffet during plaintiffs' direct examination:

THE COURT: What I am saying to you is-and I have asked you the question five times and I have gotten the same answer all five times--the one thing you say Pan Am should have had was more armed guards--at least five, as I heard your testimony.

THE WITNESS: Yes, your Honor, upwards of six.
THE COURT: How long would it take a hijacker with a machine gun to dispatch five armed guards?
THE WITNESS: What do you mean to dispatch?
THE COURT: Shoot them.
THE WITNESS: All this action is a question of seconds.
THE COURT: I know.
THE WITNESS: Now, if I have armed guard professionals, some of them with uniforms, some of them without uniforms, and they are aware why they are in the position, once the terrorists are coming with their car, they might kill one or two, but we still have professional armed guards to give the answer to kill the four terrorists.
THE COURT: It depends how good they are. If they are as good as these highly trained, specialized commando types that El Al employs, I guess you have one scenario. But if they are ordinary soldiers, you have another?
THE WITNESS: They [the security persons at Karachi] are not even soldiers, your Honor.
THE COURT: But these people testified that they are highly trained commando types, are they not?
THE WITNESS: When any other airlines decides [sic] already to have armed guards-
THE COURT: I think I have your opinion.

Id. at 1069-70. The trial judge's own experiences with airlines and his opinion as to whether El Al commandos or

ordinary soldiers would have prevented the Pan Am hijacking are plainly of no relevance to the jury. We cannot say that the above colloquies reflected "questioning [limited] to inquiries necessary to clarify ambiguities, correct misstatements, or obtain information necessary to make rulings," *Manko*, 979 F.2d at 905, and indeed they approach the tone a cross-examination on behalf of defendants. Moreover, the trial judge's questioning went to the issue of causation, upon which the jury ultimately found in favor of defendants. During the six week trial and many thousands of pages of testimony, however, the district court did not otherwise engage in improper questioning in front of the jury. Although a very close issue, upon "examination of the entire record" in this particular case, *see Manko*, 979 F.2d at 905-906, and given the trial judge's otherwise proper conduct in front of the jury throughout the entire six-week trial, we decline to vacate the judgment of the district court based upon the trial judge's questioning of Yeffet.

Plaintiffs also point to a number of remarks made by the trial judge to counsel out of the jury's presence as evidence of the district court's bias against plaintiffs. For example, after the trial judge forbade one of the plaintiff's lawyers from speaking and suggested that he go to "a trial practice school," the judge stated to another plaintiff's lawyer:

THE COURT: If you want to improve his career, tell the firm to send him to a trial practice seminar so he learns something

about the rudiments of asking a question, the rudiments of what arguments to make to a judge, what arguments not to make to a judge. . . .

[COUNSEL]: I don't want to focus on a narrow issue. I understand what you are saying. I understand. I have heard it.

THE COURT: He doesn't know how to try a case, in my view.

[COUNSEL]: I want you to know that, with my experience and my confidence in [plaintiffs' counsel], nothing has been done to undermine that confidence in him.

THE COURT: That may be. That may only prove that you are more obdurate than you should be. Frankly, when I was a partner at a law firm, I took criticisms of federal judges more seriously than that and I paid more attention to it, which is probably why I learned more than you did. The fact of the matter is that if a federal judge with my trial experience and my judicial experience and my record as a practicing lawyer before I came here, if that opinion is so unimportant to you, maybe that explains why he is as bad as he is.

Trial Tr. at 2780-82. Other similar comments, also outside the jury's presence, are cited by the plaintiffs.

To be sure, the foregoing remarks are tough medicine, not of the sort an attorney likes to hear, and perhaps their message--that the trial attorney's performance was below par and in serious need of improvement--could have been conveyed in a less acerbic manner. If the remarks had been

made in the jury's presence, we would be concerned that they might have been taken by the jury as reflecting an opinion by the judge on the merits of plaintiffs' case. But the jury did not hear them and we will not second-guess the trial judge's belief that the attorney's performance warranted the rebuke. In our view, the remarks are indicative not of judicial bias, but rather of the judge's legitimate concern over the attorney's performance at trial. Because the remarks were made outside of the jury's presence and did not otherwise impede the fairness of the proceedings, they did not influence or prejudice the trial in any way, and we therefore decline to vacate the district court's judgment on that basis. *Cf. Santa Maria*, 81 F.3d at 275 (ordering new trial because of trial judge's prejudicial comments in jury's presence).

V. Expert Witness

Finally, all of the plaintiffs claim that the district court's refusal to qualify plaintiffs' proffered perimeter security expert--Gary Stubblefield--was an abuse of that court's discretion. "The admission or exclusion of expert testimony rests soundly in the broad discretion of the trial court." *Lockerbie II*, 37 F.3d at 824; *see General Elec. Co. v. Joiner*, --- US ---, ---, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (same). Stubblefield had never been a security officer with an American commercial airport or American airline, had never performed a threat assessment of an airport, had performed no recent consulting work., and had received no

training with respect to airport or airline security. In these circumstances, we cannot say that the district court abused its discretion in refusing to qualify Stubblefield as an expert.

Conclusion

We affirm the judgment of the district court for the reasons set forth above. Each party shall pay its own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HIJACKING OF PAN AMERICAN WORLD AIRWAYS, INC. AIRCRAFT AT KARACHI INTERNATIONAL AIRPORT, PAKISTAN ON SEPTEMBER 5, 1986	:	M.D.L. 724 (JES) JUDGMENT (AEH-4562)
AJAY PATEL, a minor, by and through his Guardian Ad Litem, PARVATI PATEL; and PARVATI PATEL, Plaintiffs, vs. PAN AMERICAN WORLD AIRWAYS, INC., a corporation, and DOES 1 through 50, inclusive, Defendants.	:	87 Civ. 2993 (JES)
AVANI B. SHAH and RUPAL B. SHAH, minors, by their Guardian Ad Litem, BIPIN M. SHAH, BIPIN	:	

M. SHAH,	:	
Plaintiffs,	:	87 Civ. 2991 (JES)
vs.	:	
	:	
PAN AMERICAN WORLD AIRWAYS, INC., a corporation, and DOES 1 through 50, inclusive,	:	
Defendants.	:	
----------	x	
	:	
AISHA BEGUM and MEHBOOB KAHN,	:	
Plaintiffs,	:	87 Civ. 3686 (JES)
vs.	:	
	:	
PAN AMERICAN WORLD AIRWAYS, INC., a corporation, and DOES 1 through 50, inclusive,	:	
Defendants.	:	
----------	x	
	:	
GAYATRI DAVE and GARGI DAVE, minors, by their guardian Ad Litem, VINOD DAVE; VINOD DAVE,	:	
Plaintiffs,	:	87 Civ. 3975 (JES)
vs.	:	
	:	

PAN AMERICAN WORLD :
AIRWAYS, INC., a corporations; :
PAN AMERICAN WORLD :
SERVICES, INC., a corporation; :
and DOES 1 through 50, inclusive, :
Defendants. :

:

SANJAY PATEL, a minor, by and :
through his Guardian Ad Litem, :
C.N. PATEL; C.N. PATEL, :
Plaintiffs, : 87 Civ. 3687 (JES)
vs. :
:

PAN AMERICAN WORLD :
AIRWAYS, INC., a corporations; :
PAN AMERICAN WORLD :
SERVICES, INC., a corporation; :
and DOES 1 through 50, inclusive, :
Defendants. :

:

RANJANBEN PATEL and :
JAYSHREEBEN PATEL, minors, :
by and through their Guardian :
Ad Litem, PRAVIN PATEL; :
PRAVIN PATEL, :
Plaintiffs, : 87 Civ. 7488 (JES)

vs. :

:

PAN AMERICAN WORLD :
AIRWAYS, INC., a corporations; :
PAN AMERICAN WORLD :
SERVICES, INC., a corporation, :
Defendants. :

:

KHANJAN DALAL; KALPESH :
DALAH; KALPANA SHAH; :
DEEPALI DESAI; MEHUL SHAH; :
UTPALA M. DESAI; MILIND :
SHARAD DESAI; NARENDRA R. :
DESAI; SWATI N. DESAI, :
Plaintiffs, : 87 Civ. 7490 (JES)

vs. :

:

PAN AMERICAN WORLD :
AIRWAYS, INC., a corporations; :
PAN AMERICAN WORLD :
SERVICES, INC., a corporation, :
Defendants. :

:

GANGA BAHN; FATHER :
ANTHONY THEODORE; REKHA :
ADVANI; POONAM ADVANI; :

DINESH ADVANI; KISHIN ADVANI; TARA PATEL, as personal representative of the estate of KUVAR PATEL, deceased; MRUGESH PATEL, SANJAY PATEL, a minor, by his father and natural guardian C.N. PATEL; C.N. PATEL, individually; DAHIBEN PATEL and DILIP PAREKH,	:	
Plaintiffs,	:	87 Civ. 0547 (JES)
vs.	:	
PAN AMERICAN WORLD AIRWAYS,	:	
Defendants.	:	
	x	
NAGIN PATEL, TERA PATEL, SATISH PATEL, NATHUBAI PATEL, GOVIND PATEL, CHOTUBHAI PATEL, JAMNA PATEL, GANGA PATEL,	:	
Plaintiffs	:	87 Civ. 9108 (JES)
vs.	:	
PAN AMERICAN WORLD AIRWAYS, INC., a corporations;	:	

PAN AMERICAN WORLD SERVICES, INC., a corporation,
Defendants.

FARAIDOON OSHTORY,
Plaintiffs,
vs.

PAN AMERICAN WORLD AIRWAYS, INC. and PAN AMERICAN WORLD SERVICES, INC.,
Defendants.

87 Civ. 2990 (JES)

MANJULA S. PATEL, Individually and as Guardian Ad Litem for MEHUL PATEL, a minor, and as Heir at Law to SURENDRA PATEL, deceased, SANGITA PATEL, NIKITA PATEL, Individually and as Heirs at Law to SURENDRA PATEL, Deceased and MANJULA S. PATEL, as Administrator of the Estate of SURENDRA PATEL, Deceased,
Plaintiffs,

87 Civ. 2996 (JES)

vs. :

:

PAN AMERICAN WORLD :
AIRWAYS, INC., a corporations; :
PAN AMERICAN WORLD :
SERVICES, INC., a corporation, :
Defendants. :

---x

:

BAKUL and VASANTI SHAH, :
Plaintiffs, : 87 Civ. 3690 (JES)
vs. \ :

:

PAN AMERICAN WORLD :
AIRWAYS, INC., a corporations; :
PAN AMERICAN WORLD :
SERVICES, INC., a corporation, :
Defendants. :

---x

:

HARA GOPAL; HADI ALI RIZVI; :
MRS. HADI ALI RIZVI; NIGAR :
ZEHRA RIZVI; FARHANA :
RIZVI; PUSHPAVATHI :
MURAKONDA; HANSA :
MERCHANT; KANKUBEN :
GALA; JASWANTIBEN SHAH :
and JIGHISHA H. SHAH, Minors :

by and through HARSHAD SHAH,	:	
their Father; MRS. FARHAT	:	
HUSSAIN, MABIHAH Y.	:	
HUSSAIN and HAMEED	:	
HUSSAIN, Minors by and through	:	
MRS. FARHAT HUSSAIN, their	:	
Mother; ARMISH BHAETT;	:	
JAYABEN R. SANGHANI; MRS.	:	
JAYABEN SANGHANI;	:	
JAY GRANTIER; SAID FAIZ	:	
KIDWAI; DR. SUHAIL; SUHAIL	:	
HAMED; HASSAN SYED; M.	:	
JAYED; R.A. AHMED;	:	
AMTELIVA IBRAHIM; MALIK	:	
NETRAKANTI; IMRAN ALI;	:	
KHADIYA ALI;	:	
Plaintiffs,	:	87 Civ. 3692 (JES)
vs.	:	
	:	
PAM AMERICAN WORLD	:	
AIRWAYS, INC.; THE BOEING	:	
COMPANY; THE BOEING	:	
COMMERCIAL AIRPLANE	:	
COMPANY; B.F. GOODRICH	:	
CORPORATION; and PAN	:	
AMERICAN WORLD	:	
SERVICES, INC.,	:	
Defendants.	:	

x

MAZHERULLAH BAIG; :
KHALIDIA BAIG; SHRIKANT :
PATEL; SHATEL PATEL; HARA :
GOPAL; KUSUM NAIK; :
HARSHAD SHAH; MOHAMMED :
HUSSAIN; MADHAVDAS :
MERCHANT; ROBERTO MUNOZ :
FLORES; DELFINA ROQUE DE :
MUNOZ; FRANCISCO JAVIER :
DE MUNOZ; MICHAELA DE :
MUNOZ; RICARDO DE MUNOZ
MARIANA DE MUNOZ;
individually and as survivors of
RICARDO MUNOZ ROSALES,
deceased; ORALIAGARICA DE
ALVAREZ; AMICUTA DE
ALVAREZ; AMELIA DE
ALVAREZ; ELISA DE
ALVAREZ; JOSE ANTONIO DE
ALVAREZ; ORALIA DE
ALVAREZ; NORMA DE
ALVAREZ; JONATHAN DE
ALVAREZ; JULIO CAESAR DE :
ALVAREZ; individually and as :
survivors of JOSE ALVAREZ :
LAMAR NUNEZ, deceased; :
Plaintiffs, : 88 Civ. 0299 (JES)

vs. :

:

PAM AMERICAN WORLD :
AIRWAYS, INC.; THE BOEING :
COMPANY; THE BOEING :
COMMERCIAL AIRPLANE :
COMPANY; B.F. GOODRICH :
CORPORATION; and PAN :
AMERICAN WORLD :
SERVICES, INC., :
Defendants. :

:

SURINDER SINGH AHLUWALIA, :
Individually and Guardian Ad Litem :
for JEET INDER SINGH; a minor; :
NEELAM AHLUWALIA; :
HERMINDER SINGH; CYNTHIA :
BUTHELLO; PARAG SHETH; :
FATHER ANTHONY THEODORE;:
SAID FAIZ KIDWAI; SUHAIL :
QAMAR; HARISH CHANDRA :
PATEL and MADHUKANTA :
PATEL, :
Plaintiffs, : 87 Civ. 6570 (JES)

vs. :

PAN AMERICAN WORLD :
AIRWAYS, INC. and PAN :

AMERICAN WORLD SERVICES, INC.,
Defendants.

SADANAND SINGH, Individually and as Executor of the Estate of Kala Singh, Deceased; SAMIR SINGH, by and through SADANAND SINGH, Guardian Ad litem; KALPANA SINGH, by and through SADANAND SINGH, Guardian Ad Litem,
Plaintiffs,
vs.

87 Civ. 3108 (JES)

PAN AMERICAN WORLD AIRWAYS, INC., a New York corporation, PAN AM WORLD SERVICES, INC., a Florida corporation; ALERT MANAGEMENT SYSTEMS, INC., a Florida corporation,

---

REKHA P. KUMAR, as Sole Heir of RAJESH KUMAR, deceased, and MAHENDRA R. PATEL,

Administrator of the Estate of RAJESH KUMAR, Plaintiffs, vs. PAN AMERICAN WORLD AIRWAYS, INC. and PAN AMERICAN WORLD SERVICES, INC., Defendants.	:	87 Civ. 2999 (JES)
VINOD DAVE and NIRANJANA DAVE, Plaintiffs, vs. PAN AMERICAN WORLD AIRWAYS, INC., a corporation, and PAN AMERICAN WORLD SERVICES, INC., a corporation, and DOES 1 through 50, inclusive, Defendants.	:	88 Civ. 0929 (JES)

This multi-district litigation, comprised of a number of individual constituent actions, came on for trial before this

Court and a jury, Honorable John E. Sprizzo, United States District Judge, presiding; and the issues of liability having been duly tried commencing on March 8, 1994; the jury having rendered a special verdict on April 14, 1994, and this Court having determined as a result of that verdict that Defendant, Pan American World Airways, Inc., is not liable for damages in excess of the applicable limitation on liability imposed by the Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw, October 12, 1929 (the "Warsaw Convention"); and Defendant; Pan American World Airways, Inc., having represented that it will not contest judgments entered in the amount of the applicable limitation on liability imposed by the Warsaw Convention, less any advances previously made by Defendant to Plaintiffs,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the Plaintiffs identified below recover of Defendant, Pan American World Airways, Inc., the following amounts:

Plaintiff(s)	Amount	U.S.D.C./S.D.N.Y. Civ. No.
Ajay Patel	$66,548.90	87 Civ. 2993
Parvati Patel	$75,000	87 Civ. 2993
Avani B. Shah and Bipin M. Shah, jointly	$75,000	87 Civ. 2991

Plaintiff(s)	Amount	U.S.D.C./S.D.N.Y. Civ. No.
Rupal B. Shah and Bipin M. Shah, jointly	$75,000	87 Civ. 2991
Aisha Begum and Mehboob Khan, jointly	$75,000	87 Civ. 3686
Gayatri Dave, Vinod Dave, and Niranjana Dave, jointly	$50,000	87 Civ. 3975
Gargi Dave, Vinod Dave and Niranjana Dave, jointly	$50,000	87 Civ. 3975
Sanjay Patel and C. N. Patel, jointly	$12,936.50	87 Civ. 3687
Jayshreeben Patel and Pravin Patel, jointly	$75,000	87 Civ. 7488
Ranjanben Patel and Pravin Patel, jointly	$75,000	87 Civ. 7488
Deepali Desai	$75,000	87 Civ. 7490

Plaintiff(s)	Amount	U.S.D.C./S.D.N.Y. Civ. No.
Kalpesh Dalal and Khanjan Dalal, jointly, as survivors of Trupti Dalal, deceased	$75,000	87 Civ. 7490
Dilip Parikh	$5,722.17	87 Civ. 0547
Tara Patel, Nathubai Patel, Govind Patel, Chotubhai Patel, Jamna Patel and Ganga Patel, jointly, as survivors of Kuvar Patel, deceased	$75,000	87 Civ. 9108
Nagin Patel, Tara Patel and Satish Patel, jointly, as survivors of Rajesh Kumar, deceased	$75,000	87 Civ.9108
Faraidoon Oshtory	$68,748.20	87 Civ. 2990

Plaintiff(s)	Amount	U.S.D.C./S.D.N.Y. Civ. No.
Manjula S. Patel, individually, as guardian ad litem and as heir and administrator of the estate of Surendra Patel, deceased; Sangita Patel and Nikita Patel, individually and as heirs of Surendra Patel, deceased; and Mehul Patel, as heir of Surendra Patel, deceased	$225,000	87 Civ. 2996
Bakul Shah	$75,000	87 Civ. 3690
Father Anthony Theodore	$10,000	87 Civ. 6570
Sadanand Singh, individually and as executor of the estate of Kala Singh, deceased; Samir Singh and Kalpana Singh	$300,000	87 Civ. 3108

Plaintiff(s)	Amount	U.S.D.C./S.D.N.Y. Civ. No.
Nabihah Y. Hussain and Mrs. Farhat Hussain, jointly	$75,000	87 Civ. 3692
Hameed Hussain and Mrs. Farhat Hussain, jointly	$75,000	87 Civ. 3692
Mohammed Hussain and Mrs. Farhat Hussain, jointly	$75,000	87 Civ. 3692 and 88 Civ. 0299

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Complaints of the Plaintiffs identified below be dismissed on the merits:

Plaintiff(s)	U.S.D.C./S.D.N.Y. Civ. No.
Rekha P. Kumar, as heir of Rajesh Kumar, deceased, and Mahendra R. Patel, as administrator of the estate of Rajesh Kumar	87 Civ. 2999
Vinod Dave and Niranjan Dave	88 Civ. 0929

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Defendant, Pan American World Airways, Inc., be and is allowed costs as the prevailing party.

DATED: New York, New York,
/s/ 3-24-97
/s/ John E. Sprizzo
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON /s/ 4/1/97

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IN RE HIJACKING OF PAN AMERICAN WORLD AIRWAYS, INC., AIRCRAFT AT KARACHI INTERNATIONAL AIRPORT, PAKISTAN ON SEPTEMBER 5, 1986	M.D.L. 724 (JES) (All Cases) Verdict Form

----------X

1) Do you find by a fair preponderance of the evidence that Pan American World Airways, Inc. Engaged in wilful misconduct, as defined by the Court, in connection with the Alert Security Program?

YES X NO ___

2) Do you find by a fair preponderance of the evidence that Pan American World Airways, Inc. Engaged in wilful misconduct, as defined by the Court, by flying into Karachi International Airport on September 5, 1986?

YES ___ NO _X_

If the answer to neither Question #1 nor Question #2 is YES proceed no further.

3) If the answer to Question #1 is Yes, do you find by a fair preponderance of the evidence that the wilful misconduct of Pan American World Airways, Inc., in the connection with the Alert Security Program, was a proximate cause of the hijacking?

YES ___ NO _X_

~~4) If the answer to Question #2 is Yes, do you find by a fair preponderance of the evidence that the wilful misconduct of Pan American World Airways, Inc., by flying into Karachi International Airport on September 5, 1986, was a proximate cause of the hijacking?~~

YES ___ NO ___

/s/Susanne S. Greed /s/4-14-94
Signature (Foreman of the Jury)

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

FORTY LISTED PLAINTIFFS' MEMORANDUM IN OPPOSITION TO PAN AM'S MOTION TO TRANSFER UNDER 28 U.S.C. §§ 157(b)(5) OR 1404(a) FOR A CONSOLIDATED LIABILITY TRIAL

(Excerpts Beginning on Page 21)

D. FORTY LISTED PLAINTIFFS' TWELVE CENTRAL DISTRICT OF CALIFORNIA ACTIONS SHOULD BE REMANDED TO THE CENTRAL DISTRICT OF CALIFORNIA UNDER 28 U.S.C. § 1407 (a) AND M.D.L. RULE 14(b)&(c) FOR TRIAL.

In part, 28 U.S.C. § 1407(a) provides:

> "Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred . . .: Provided, however, That the panel may separate any claim . . . and remand any . . . such claims before the remainder of the action is remanded."

(emphasis added) Accord, M.D.L. Rule 14 (b)&(c). Forty Listed Plaintiffs request that this court remand their twelve actions to California for trial. Should this court disagree, Forty Listed Plaintiffs request that this court, at least, remand all of their state law claims and all of their damage claims to California for trial.

IV.
CONCLUSION

This court as the authority to remand these cases to the transferor court for trial under 28 U.S.C. §§ 157 (b)(5) & 1407. Pan Am has not met it burden of proof under 28 U.S.C. § 1404(a). Thus, this court should respect the wishes of the Forty Listed Plaintiffs and remand their twelve actions for trial in the Central District of California under 28 U.S.C. § 1407(a) and M.D.L. Rule 14(b)&(c).

DATE: Los Angeles, California
November 12, 1993

MAGAÑA, CATHCART & McCARTY

BY: /s/ Daniel C. Cathcart
Daniel C. Cathcart (DC-7415)
A Member of the Firm

1801 Avenue of the Stars
Suite 810
Los Angeles, California 90067
310-553-6630

(This order of the District Court was contained in Volume 3 of the Joint Appendix filed with the Court of Appeals for the Second Circuit beginning on Page 1110.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

IN RE HIJACKING PAN AMERICAN WORLD AIRWAYS, INC. AIRCRAFT AT KARACHI INTERNATIONAL AIRPORT, PAKISTAN ON SEPTEMBER 5, 1986

MDL 724 (JES)
(ALL CASES)
ORDER

---x

All counsel in the above-captioned action having appeared before this Court for Oral Argument on December 10, 1993, and defendant having filed a motion to transfer to this Court Singh v. Pan Am World Airways, Inc., 87 0246E (IEG) (S.D. Cal.), and the other eighteen (18) actions before the Central District of California, and the Court having considered all matters raised, it is

ORDERED that, for the reasons stated at Oral Argument, defendant's motion to transfer shall be and hereby is granted.

Dated: New York, New York
December /s/ 13, 1993

/s/ John K. Sprizzo
John K. Sprizzo
United States District Judge

(This order of the District Court was contained in Volume 3 of the Joint Appendix filed with the Court of Appeals for the Second Circuit beginning on Page 1213.)

(Partial Document)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HIJACKING OF PAN AMERICAN WORLD AIRWAYS, INC. AIRCRAFT AT KARACHI INTERNATIONAL AIRPORT, PAKISTAN ON SEPTEMBER 5, 1986	:	M.D.L. 724 (JES) JOINT PRE-TRIAL ORDER
THIS DOCUMENT FILED IN ALL ACTIONS		(CC-7278) (MM-0143)

The parties having conferred among themselves and with the Court pursuant to Fed.R.Civ.P. 16, now therefore the following statements, directions and agreements are adopted as the Joint Pre-Trial Order herein:

(1) JURISDICTION -- VENUE:

The jurisdiction of this Court is invoked pursuant Section 1331 of Title 28 United States Code and the

Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention"), 49 Stat. 3000, T.S. 876 (1934), reprinted at note following 49 U.S.C. App. § 1502. In a number of constituent actions the jurisdiction of this Court is also invoked pursuant to Section 1332 of Title 28 United States Code. The jurisdiction of this Court is not disputed.

Venue before this Court for coordinated and consolidated pre-trial proceedings was initially selected by the Judicial Panel on Multidistrict Litigation, pursuant to an order filed April 7, 1987. Pursuant to an order of this Court dated December 13, 1993, and filed on December 16, 1993, all actions have been transferred to this Court, pursuant to Title 28 United States Code, § 1404(a), for the trial of all common liability issues, including all subsequent appellate procedures, and all actions so transferred to this Court have been consolidated with the related cases originally filed in this Court for a joint liability trial, pursuant to Fed. R. Civ. P. 42(a).

Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

Nº. 98-905, 98-907

In The
Supreme Court of The United States
October Term 1998

SADANAND SINGH, et al.
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.
Respondents.

AJAY PATEL, et al.
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

CLINTON H. CODDINGTON*
RICHARD G. GROTCH
Coddington, Hicks & Danforth
555 Twin Dolphin Drive, Suite 300
Redwood City, California 94065
(650) 592-5400

Attorneys for Respondents
**Counsel of Record*

APPELLATE ADVANTAGE
POST OFFICE BOX 7506◆KANSAS CITY, MO 64116◆816-453-2424

2798

QUESTIONS PRESENTED

1. Did the court of appeals correctly rule that *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998) does not apply retroactively to require the setting aside of a verdict, on the ground of improper venue, in a consolidated liability trial held four years previously? Alternatively, can the judgment below be affirmed on the ground that: (i) the petitioners failed to preserve their objection to the district court's order transferring the cases to itself under 28 U.S.C. § 1404(a); or, (ii) the district court's transfer order was authorized by 28 U.S.C. § 157(b)?

2. Did the court of appeals correctly rule that, when plaintiffs base their claims of wilful misconduct under the Warsaw Convention upon alleged misrepresentations regarding security by the air carrier, plaintiffs must prove that the accident (a hijacking) would not have occurred if the carrier had done all that it said it would in the representations it made?

Corporate Disclosure Statement

Pursuant to Rule 29.6, respondent makes the following disclosure. At the time of the incident giving rise to this action and at the time of the district court trial, respondent Pan American World Airways, Inc. and Alert Management Systems, Inc. were a direct, wholly owned subsidiary of Pan Am Corporation. Pan American World Airways, Inc. then had the following subsidiaries and affiliates which were not wholly owned: Aeronautical Radio, Inc., Air Cargo, Inc., Airline Tariff Publishing Company, Escola Americana de Rio de Janeiro, Honolulu Fueling Facilities Corporation, International Aeradio (Caribbean) Ltd., Liberian Development Corporation, Manhattan Air Terminal, Inc., Nigerian Aviation Handling Co., Social Immobiliaria Norteamericana, S.A. and Société International de Télécommunications Aeronautiques.

Currently, Pan Am Corporation and the operating entities which were its direct, wholly owned subsidiaries, are in the final stages of liquidation following bankruptcy. The name Pan American World Airways, Inc. was sold through the bankruptcy proceedings and any entity now using that name is unrelated to the parties to this proceeding.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Pan American World Airways, Inc. and Alert Management Systems, Inc. (hereinafter collectively referred to as "Pan Am") respectfully pray that the petitions for certiorari filed in these cases on behalf of petitioners[1] be denied.[2]

I.

STATUTORY PROVISIONS

In addition to the statutory and treaty provisions set forth in the petitions, 28 U.S.C. § 157(b)(5) is applicable and provides that:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the

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[1]This brief is filed in opposition to the petitions for certiorari filed in Docket No. 98-905 (*Singh v. Pan American World Airways, Inc.*) ("Singh petitioners") and Docket No. 98-907 (*Patel v. Pan American World Airways, Inc.*) ("Patel petitioners"). Both petitions pertain to the same district court and court of appeals proceedings and raise the same issues for review by this Court.

[2]Citation to the petition for certiorari filed by the Singh petitioners will be to "Singh Pet."; citation to the petition for certiorari filed by the Patel petitioners will be to "Patel Pet."; citation to the appendices to the petitions will be to "Singh App." and "Patel App.," respectively.

bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

II.
STATEMENT OF THE CASE

A. The Hijacking

By means of a carefully planned and well-executed criminal scheme orchestrated by the Abu Nidal Organization, Pan Am flight 73 was hijacked while on the tarmac in Karachi, Pakistan. That attack occurred more than a dozen years ago. At the time of the hijacking, the jumbo jet was in an area heavily guarded and patrolled by the Pakistan government's armed Airport Security Force. (Under local law, Pan Am did not provide and could not have provided security for its passengers and aircraft.) The well-protected perimeter of security at the airport was penetrated by sophisticated terrorists who employed an unprecedented "deception and disguise" method of attack. In the course of the assault, a number of passengers aboard the plane were injured – some of them fatally.

B. The Claims Against Pan Am

Flight 73 had been destined for New York. Because the hijacking was an accident which occurred in international

air transport, the petitioners' claims were governed by the Warsaw Convention.[3] As supplemented by the Montreal Agreement[4] for flights serving the United States, the Convention limits air carrier liability for personal injury or wrongful death to $75,000 per passenger in all cases except those in which the plaintiffs can establish that the accident was caused by the wilful misconduct of the air carrier.

To free themselves from the treaty's limitations on liability, the petitioners urged that Pan Am engaged in wilful misconduct. Specifically, the claims were founded upon the contention that Pan Am's Alert Security Program, which had been announced several months before the hijacking, had not been properly implemented in Karachi. The Singh family petitioners additionally claimed that they would not have been on Flight 73 but for their reliance on a newspaper advertisement concerning the Alert Security Program.

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[3]The treaty commonly known as the "Warsaw Convention" is formally entitled the Convention for the Unification of Certain Rules Relating to International Transportation By Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. 876 (1934), *reprinted at* note following 49 U.S.C. App. § 40105.

[4]Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol, Agreement CAB 18990, approved by order E-23680, May 18, 1966 (Docket 17325).

C. Consolidation for Trial

Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation ("JPML") transferred the cases against Pan Am for consolidated pretrial proceedings in the Southern District of New York. (Singh. App. at B-47). Thereafter, Pan Am moved that the cases be consolidated for a trial on common liability issues in the Southern District of New York. (*Id.* at B-48). Pan Am furnished two bases for this motion: (i) 28 U.S.C. § 1404(a) and (ii) 28 U.S.C. § 157(b)(5). (*Id.*) Section 157(b)(5) was applicable because Pan Am was in a bankruptcy reorganization that was pending in the Southern District of New York. (*Id.* at B-47 n.6). The court's transfer order did not specify the statutory basis for the order, referring instead to the reasons given at a hearing that was not transcribed. (*Id.* at A-10).

D. Trial and Verdict

Following the presentation of evidence over a period of six weeks in early 1994, the jury returned its special verdict. (*Id.* at B-80-81). Asked whether it found "by a fair preponderance of the evidence that [Pan Am] engaged in wilful misconduct, as defined by the Court, in connection with the Alert Security Program," the jury answered, "Yes." (*Id.* at B-80). But questioned about whether it found, by the same quantum of proof "that the wilful misconduct of [Pan Am], in connection with the Alert Security Program, was a proximate cause of the hijacking," the jury responded, "No."

(*Id.* at B-81).[5] Petitioners did not object either to the instructions to the jury or to the special verdict form. (*Id.* at A-29).

E. Post-Trial Proceedings

Judgment was entered April 1, 1997, almost three years after trial. (*Id.* at B-80). Much of this intervening period of time was spent in the briefing of post-trial motions and, in particular, the Singh petitioners' efforts to try what they characterized as their "non-common" fraud claim against Pan Am. Ultimately, the district court rejected this effort and ruled that the Singh petitioners had no separate, viable claim for fraud. (*Id.* at B-61).[6]

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[5]The jury also rejected the petitioners' claim that Pan Am engaged in wilful misconduct by flying into Karachi International Airport on the date of the hijacking. (Singh App. at B-81).

[6]The district court's memorandum and order dated February 14, 1996 is printed at *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986*, 920 F.Supp. 408 (S.D.N.Y. 1996).

III.

REASONS FOR DENYING THE WRIT

A. Introduction

The court should deny review for several reasons. With respect to the *Lexecon* issue, there is no conflict between the decisions of any of the courts of appeals and petitioners have not identified one.[7] The question of retroactive application of *Lexecon* is not squarely presented because there are alternative grounds for affirmance. And, in all events, the Second Circuit's decision that *Lexecon* should not be applied retroactively to upset a trial held four years earlier was correct for the reasons given by that Court.

With respect to the issue of causation in a Warsaw Convention case which is founded upon allegations of fraud, petitioners claim that theirs is an issue of "first impression." This plain fact puts to rest any notion that there is a conflict in the decisions of the courts of appeals. Apart from being an allegedly novel issue in the 70 year history of the Convention, the question raised by the petitioners is unlikely to recur in the future, particularly in view of recent intercarrier agreements by which carriers have waived the limitations on liability under the Convention. To the extent that petitioners challenge the jury instructions, their objection was waived by

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[7]The decision of the Second Circuit is published as *Shah v. Pan American World Services, Inc.*, 148 F.3d 84 (2d Cir. 1998).

their pretermission timely to complain. Moreover, the court of appeals was correct in ruling that the standard for proximate causation in a so-called fraud based wilful misconduct case is a matter of federal law. Finally, the court of appeals correctly held that under the Convention, the liability limitation will apply if the hijacking would have occurred even if the airline had fulfilled all its alleged promises of enhanced security. The argument postulated by the petitioners is contrary to the primary aim of the Convention: recognition of a uniform regime of limited liability in international air transportation.

B. The *Lexecon* Decision Was Properly Considered by the Second Circuit

1. There Is No Conflict Between the Second Circuit's Decision and the Decisions of Other Circuits

Petitioners have not identified a conflict in the decisions of the United States courts of appeals concerning whether *Lexecon* is to be applied retroactively – much less whether it is to be applied retroactively where the alleged conduct giving rise to the action occurred more than 12 years earlier and the trial that is sought to be undone took place more than four years earlier. There is no such conflict.

2. There Are Alternative Grounds for Affirmance of the Second Circuit's Decision

The issue regarding the retroactive application of *Lexecon* is not squarely presented because there are alternative grounds to affirm the court below.

a. Petitioners Waived Any Venue Objections

Lexecon instructs, *inter alia,* that an objection to venue may be waived under Section 1407(a). *Lexecon,* 118 S.Ct. at 963 n.1, 966 n.5. Under 28 U.S.C. § 1406(b), a party is required to "interpose timely and sufficient objections to venue."

In *Lexecon*, this Court forgave the petitioner's failure properly to move the JPML for remand because, while it had not sought remand from the Panel, the petitioner *had* "continuously objected" to the self-assignment in the district court (and even in petitions for extraordinary relief presented to the Ninth Circuit). *Lexecon,* 118 S.Ct. at 960, 966. Here, in contrast, to the extent there were any objections at all, they were neither timely nor sufficient.[8] The Second Circuit noted

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[8]In *Lexecon*, for instance, the petitioners moved to remand under Section 1407. In the instant case, none of the plaintiff-petitioners did so. In *Lexecon*, the petitioners subsequently renewed their motion to remand under Section 1407; here, having failed to move for remand in the first

this argument, but had no cause to address it having found that *Lexecon* did not apply retroactively. (Singh App. at A-17).

In the instant case, there were, in fact, *no* pre-trial motions to remand presented to the transferee court. And petitioners made no application in this regard to the JPML or to any other tribunal. On May 14, 1993, in an order affecting "ALL CASES," the district judge detailed a schedule which included both pretrial and *trial* dates *in the transferee court*. Still, no one argued that venue was improper. Beyond waiving any venue objection in the district court, petitioners also failed adequately to assert the issue in the court of appeals.[9] Such pretermission to raise the transfer/venue issue

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instance, there was no such prayer for petitioners to renew. The petitioners in *Lexecon* sought an interlocutory appeal through a Petition for Writ of Mandate from the Ninth Circuit; the petitioners here did not seek similar relief from the Second Circuit. And, in *Lexecon*, the petitioners pursued a post-judgment appeal of the transfer order. As noted above, and discussed further below, in the instant case, none of the petitioners challenged the propriety of venue in their opening or reply briefs to the Second Circuit.

[9]None of the four briefs filed by petitioners anywhere raised the issue that the district court improperly transferred the actions to itself for purposes of trial. Petitioners made neither mention of *Lexecon* nor of any arguments about the propriety of the transfers under either Sections 157(b)(5) or 1404(a), even although they filed their opening briefs

must be the result either of imprudence or an impermissible "wait and see" attitude. Of course, preventing two bites at the apple is among the primary reasons for the harmless error statute (28 U.S.C. § 2111).

b. Transfer to the Southern District of New York Was Permitted Under 28 U.S.C. § 157(b)(5)

When Pan Am moved for a consolidated liability trial in the transferee court, it did so pursuant to Section 157(b)(5)[10] or, *alternatively*, Section 1404(a). (Singh App. at

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approximately two months after certiorari was granted in *Lexecon*. (Sections 157(b)(5) and 1404(a) are nowhere mentioned in the Patel briefs; in the Singh briefs they appear only once, in a footnote.)

[10]Pan Am initiated Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court of the Southern District of New York on January 8, 1991. (Singh App. at B-47 n.6).

In proceedings under Section 157(b)(5), "[t]ransfer should be the rule, abstention the exception." *In re Pan American Corp.*, 950 F.2d 839, 845 (2d Cir. 1991). In *Pan American Corp.*, the Second Circuit founded its holding on several grounds, including (1) the mandatory language of Section 157(b)(5); (2) the legislative history, including "Congress' desire to eliminate the confusion, delay and inefficiencies associated with the Bankruptcy Act's limited

B-48). The Second Circuit relied on the joint pre-trial order as the basis for concluding that the district court had based its transfer on Section 1404. (*Id.* at A-10). But that order was drafted by the lawyers, not by the court. The district court itself, however, expressly noted in its post-trial opinion that Pan Am's motion was based on both statutes and stated that it had granted the motion without distinguishing between the two grounds. (*Id.* at B-48). The implication is that the district court relied on both Section 157(b) and Section 1404 in granting Pan Am's motion.

To be sure, the Second Circuit also reasoned that even if the district court had relied upon Section 157(b)(5), that Section 1407, as construed in *Lexecon*, would nonetheless have required a remand to the original fora. (Singh App. at A-12-13). This rationale is erroneous. The Court in *Lexecon* did not deal with the interplay between Sections 1407 and 157(b)(5). The latter is a unique provision that allows a court to transfer to itself cases pending in other federal districts – and even in state courts. It would make no sense to conclude that Section 1407 mandates a superfluous remand to the original courts in cases where Section 157(b)(5) authorizes

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jurisdictional scheme"; and (3) "the manifest purpose of section 157(b)(5) . . . [which is] 'to centralize the administration of the estate and to eliminate the "multiplicity of forums for the adjudication of parts of a bankruptcy case."'" (950 F.2d at 845.)

the district court to transfer the cases to itself from those other courts.

c. The Second Circuit Correctly Addressed the Merits of *Lexecon*

Petitioners' urging – that *Lexecon* applies retroactively to this case – rests upon a fundamental misapprehension: that this Court was not serious when it said it was "unnecessary" to consider whether its decision "should be applied only prospectively" and when it therefore did not consider (*viz.* "reserved") the issue of retroactivity of its decision. *Lexecon*, 118 S.Ct. at 966 n.5.

Because in *Lexecon* the Court did not decide whether the decision would be retroactive, the Second Circuit was correct in recognizing that *Lexecon* was a case which, under *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), did not require retroactive application. (Singh App. at A-14). Particularly was this true given that the ruling in *Lexecon* relates to venue, not, as in *Harper*, to an issue of constitutional right.

So too was the court of appeals correct in applying the *Chevron Oil* retroactivity analysis (*Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)) and in thus reaching the conclusion that retroactive application, in the instant case, would not be appropriate. (*Id.* at A-14-17).[11]

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[11]Apart from application of the *Chevron Oil* factors which weigh decisively against retroactive application of

C. The Second Circuit Decision Applied the Correct Standard of Causation for a Wilful Misconduct Claim Based on Fraud

1. There Is No Conflict Between the Second Circuit's Decision and the Decisions of Other Circuits

Petitioners go to considerable lengths to characterize as an issue of "first impression" the question of what constitutes the appropriate causation standard in a fraud-based wilful misconduct claim under the Warsaw Convention. (See Singh Pet. at 10, 18; Patel Pet. at 16, 17 (calling the standard "unprecedented")). The fact that it has taken nearly 70 years for the question to arise under the Convention, belies petitioners' assertion that there is a compelling need for "this Court . . . [to] grant review to provide guidance on what the [causation] standard should be." (Singh Pet. at 18).

Lexecon in this case, retroactive application would also amount to a boon to these petitioners (who failed to preserve the point in any event, see *infra.*). This stroke of luck would result solely because of the twin, serendipitous facts that judgment and issuance of the mandate were not rendered with sufficient celerity by the district court and the court of appeals, respectively, to allow the case to become final before this Court rendered its decision in *Lexecon*. The verdict was rendered on April 14, 1994, and *Lexecon* was not decided until March 3, 1998, almost four years later.

2. There Is No Likelihood the Issue Raised by Petitioners Will Recur

Moreover, this causation issue, which has taken almost seven decades first to present itself, is vastly *less* likely to arise in the future.

a. The IATA Intercarrier Agreement Renders Petitioners' Arguments Moot

Under the IATA Intercarrier Agreement[12] which took effect in 1997, major international and United States air carriers agreed to forbear from availing themselves of the liability limitations of the Warsaw Convention. Under the IATA Intercarrier Agreement, passengers may assert claims for compensatory damages which are not subject to any ceiling without an accompanying requirement that they prove "wilful misconduct." With this change in the legal landscape, the issue presented by petitioners is irrelevant.

b. Montreal Protocol No. 4 Renders Petitioners' Argument Moot

To a substantial extent, petitioners' arguments depend upon the construction of Article 25 of the original Warsaw

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[12]See, e.g., DOT Order 97-1-2 (January 8, 1997) adopting the majority of the terms of the IATA Agreement on Measures to Implement the IATA Intercarrier Agreement opened, for signature in May 1996.

Convention, and in particular, linguistic quibbles about what was meant by particular terms used in the original French text of the treaty. In September 1998, however, the Senate ratified Montreal Protocol No. 4 to the Convention.[13] And with ratification, petitioners' pettifoggery evaporated. Because the Protocol significantly amends Article 25,[14] the various foreign language linguistic arguments advanced by petitioners have been settled prospectively.

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[13]Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, signed at Warsaw on October 12, 1929, as amended by the Protocol Done at the Hague on September 8, 1955, reprinted in S. Exec. Rep. No. 105-20, pp. 21-32 (1998).

[14]As amended, Article 25 states:

> In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

3. Petitioners Failed to Preserve Any Objection to the Manner in Which the Jury Was Instructed on the Standard of Causation

At its core, petitioners' complaint is with the way the jury was instructed on the issue of causation – that Pan Am's alleged wilful misconduct must have proximately caused the accident for purposes of recovering damages without limitation under the Convention. Petitioners take issue both with the jury charge and the special verdict form. As the Second Circuit correctly observed, however, the petitioners themselves (a) "fail[ed] to request a more precise charge," (b) "fail[ed] to object to the district court's proposed special verdict form," and (c) proffered their "own requested jury charge [which] asked 'whether the wilful misconduct was a proximate cause of the hijacking and deaths of the passengers.'" (Singh App. at 29, 32). In sum, petitioners waived any right to urge the objections here.[15]

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[15]The scope of the petitioners' waiver of arguments concerning the standard of causation in a fraud-based wilful misconduct case assumes still greater proportions with respect to the Patel petitioners. The Patels did not even urge a fraud or misrepresentation claim in the district court and (presumably for that reason) made no complaint to the Second Circuit about the causation standard applied by the district court.

4. The Second Circuit's Analysis of Causation Was Correct and Consonant with the Convention's Primary Purpose of Limiting Liability

Finally, the court of appeals was correct in ruling that the standard for proximate causation between the wilful misconduct and the hijacking is a matter to be resolved under the law of the Convention. (Singh App. at A-23). In urging application of California state law, the Singh petitioners rely upon an erroneous reading of this Court's decision in *Zicherman v. Korean Air Lines Co., Inc.*, 516 U.S. 217, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996). *Zicherman* required resort to local law for resolution of the damages issue – but only because Article 24(2) of the Convention expressly deferred to local law on that precise point. 516 U.S. at 224-25, 116 S.Ct. 629. *Zicherman* supports the holding of the Second Circuit; it does not bolster the sinuous causation analysis advanced by the Singh petitioners.

The Second Circuit also correctly held that under the Convention, if the hijacking would have occurred even if the airline had fulfilled all its alleged security promises, the limitations of liability would apply.[16] (Singh App. at A-26-

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[16]As the Second Circuit properly recognized, "[i]f . . . Pan Am's institution of the Alert program as promised would not have prevented the hijacking of Pan Am Flight 73, then the representation cannot have 'caused' [petitioners'] injuries any more than the failure to serve a promised meal .

27). To hold air carriers liable for damages that would have occurred regardless of whether the carrier's representations of enhanced security were ultimately performed as promised – as petitioners suggest – would be to assail the Convention's overriding purpose of limiting air carrier liability. (*Id.* at A-26). The Second Circuit's holding in the instant case is bolstered by this Court's most recent decision interpreting the treaty, *El Al Israel Airlines, Ltd., v. Tseng*, 1999 WL 7724 (1999), including the Court's reaffirmation of the conviction that "[t]he cardinal purpose of the Warsaw Convention . . . is to 'achiev[e] uniformity of rules governing claims arising from international air transportation.'" *Id.* at *8.

. . and any 'reasonable relationship' between the representations and the injuries would be purely coincidental." (Singh App. at A-26). The court of appeals did not hold, contrary to what the Patel petitioners claim, that plaintiffs would be required to prove the carrier's "direct participation" in the hijacking. Rather, they would need only to establish that the carrier was in a position to prevent the attack – something they failed adequately to prove.

IV.
CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the judgment of the United States Court of Appeals for the Second Circuit in these cases.

Respectfully submitted,

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